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REPORTS

OF

C A S E S

ARGUED AND ADJUDGED

IN THE

Supreme Court of the United States,

IN THE YEARS 1805 AND 1806.

VOL. III.

BY WILLIAM CRANCH,

CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

POTIUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA.
Cicero de Legibus. Dial. 1.

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1807.

NC

District of Columbia, to wit:

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CASES CITED.

A

page

ADAMS v. Savage, 198, 322
Aguilar v. Rodgers, 374
Aldrich, Spendlove v. 255
Arthur, Roberts v. 201
Ashhurst, Jones v. 359, 365
Attorney-General v. Freeman, 360

B

Bailis v. Gale, 112, 113
Balfour's lessee v. Meade, 45
Barbour, Shelton v. 191
Barnes, Rhodes v. 296
Bazadone, Clarke v. 170
Beachcroft v. Beachcroft, 118
Beatson, v. Haworth 370, 378 381
Beckwith, Ibbetson v. 111, 113
Bempde v. Johnstone, 320
Bernard v. Saul, 184
Betsy, 480
Betty Cathcart, 377
Blackburne, Chinnery v. 146
Blacket, Bowes v. 102
Blakes, Middlewood v. 373 381, 390, 397
Blenkinson, Iles v. 497
Blight, Loveacres v. 102, 112
Boehme, Carter v. 377
Bolton, Bridgewater v. 110
Borough, Holman v. 203, 231
Bowes v. Blackett, 102
Bowman v. Milbanke, 118
Boydell, Wooldridge v. 370 378, 381, 389

page

Brailsford, Georgia v. 457
Briddle, Field v. 191
Bridgewater v. Bolton, 110
Bright v. Eynou, 304
Bristow v. Wright, 199
Bruce v. Bruce, 320
Bull v. Calder, 399
Bull, Shaw v. 118
Burrows v. Jemino, 184
Burt, Doe v. 191

C

Calder v. Bull, 399
Calvin's case, 104, 105, 106, 123
Carter v. Boehme, 377
Carter v. Royal Ex. Ass. Co. 388, 393
Cely, Cowslad v. 227
Chapman v. Turner, 226
Charming Betsey, 483, 502
Chester v. Painter, 103, 111 116
Chinnery v. Blackburne, 146
Clarke v. Bazadone, 170
Clarke v. Young, 315
Christie v. Secretan, 377
Cole v. Rawlinson, 120
Cooke v. Oxley, 494
Cowslad v. Cely, 227
Cox, Hilliard v. 322

D

Darwent v. Walton, 227
Delaney v. Stoddert, 381
Demattos, Worseley v. 84
Denn v. Gaskin, 112

page

Denn, Moore v. 118
Despard, Wilkins v. 341
Doe, ex dem. Duroure v. Jones, 107, 177
Doe v. Burt, 191
Duplessis, Knight v. 109
Dutchess of Kingston's case, 323

E

Eden, Hamilton v. 457
Edgeworth, Barry v. 111, 113
Edwards, Floyer v. 183
Englefield's Case, 109
Evans, Marsh v. 254
Eynou, Bright v. 304

F

Faikney v. Reynous, 183
Fenwick v. Sears, 320, 321
Field v. Briddle, 191
Finch, Hole v. 231
Fisher, U. S. v. 82
Fletcher, Mills, v. 376, 380
Fletcher v. Smiton, 103, 112
Fletcher, Thelluson v. 376
Floyer v. Edwards, 183
Foster v. Wilmer, 378, 393
398
Freeman, Attorney-General v. 360
Fristoe, Gibson v. 184
Frogmorton v. Wright, 103
112

G

Gale, Bailis v. 112, 113
Gaskin, Denn v. 112
Georgia v. Brailsford, 457
Gibson v. Fristoe, 184
Goodwin v. Goodwin, 118
Goss v. Withers, 374
Gregory v. Setter, 191
Græme, Strithorst v. 176

H

Hall, Walcot v. 257
Hamilton v. Eden, 457
Hamilton v. Mendez, 374
Hamilton v. Russell, 89
Hamilton, U. S. v. 449
Hannay, Petrie v. 183
Harman, Smith v. 198
Hartley, Pringle v. 374, 380
Haworth, Beatson v. 370, 378
381
Henshaw v. Marine Ins. Co. 378, 385, 390
Hilliard v. Cox, 322
Hodges v. Middleton, 112
Hogan v. Jackson, 112
Hole v. Finch, 231
Holman v. Borough, 203, 231
Hornsby v. Scott, 95
Hunter v Potts, 320
Hylton, Ware v. 457

I

Ibbetson v. Beckwith, 111, 113
Iles, Blenkinson v. 497

J

Jackson, Hogan v. 112
———, Perry v. 177
——— v. Vernon, 145
Jemino, Burrows v. 184
Johnson, Simm v. 94
Johnstone, Bempde v. 320
Jones v. Ashhurst, 359, 365
———, Duroure v. 107, 177
Jordaine v. Lashbrook, 286
Jordan v. Jordan, 494

K

Kaines, Orr v. 255
Kearslake v. Morgan, 315
Keely, Winch v. 208
Kewley v. Ryan, 372, 381, 385
389
King v. May, 203
——, U. S. v. 88
Knight v. Duplessis, 109

L

LaVengeance, U. S. v. 92, 174
Lashbrooke, Jordaine v. 286
Lechmere v. Thorowgood, 361
Loveacres v. Blight, 102, 115

M

Madison, Marbury v. 332
Marbury v. Madison, 332
Markant v. Twisden, 118
Marine In. Co. Henshaw v. 378, 385, 390
Marsh, Evans v. 254
May, King v. 203
Maxwell, Puckford v. 315
M'Ferlan, Moses v. 347
M'Minn v. Owen, 191
M'Master v. Shoolbred, 374
Meade, Balfour's lessee v. 45
Mendez, Hamilton v. 374
Middleton, Hodges v. 112
Middlewood v. Blakes, 373, 381 390, 397
Milbanke, Bowman v. 118
Mills v. Fletcher, 376, 380
Modigliani, Way v. 370, 378 381, 389
Moore v. Denn, 118
Moore, U. S. v. 449
Morgan, Kearslake v. 315
Morris v. Neighman, 38
Morse, Tanner v. 118
———, Owenson v. 316
Moses v. M'Ferlan, 346
Murdoch v. Potts, 390
Murray v. Wise, 111

N

Neighman, Morris's lessee v. 38
Norvel, Ross v. 191

O

Orr v. Kaines, 255
Owen, M'Minn v. 191
Owenson v. Morse, 316
Oxley, Cooke v. 494

P

Page's Case, 109
Page, Tuffnell v. 135
—— v. Pendleton, 457
Painter, Chester v. 103, 111 11·
Pendleton, Page v. 45;
Perkins, Timewell v 117
Perry v. Jackson, 177
Petrie v. Hannay, 183
Potts, Hunter v. 320
——, Murdoch v. 390
Pringle v. Hartley, 374, 380
Puckford v. Maxwell, 315

R

Rawlinson, Cole v. 120
Reynous, Faikney v. 183
Rhodes v. Barnes, 296
Right v. Sidebotham, 102, 112
Roberts v. Arthur, 201
———, Withered v. 340, 346 359, 361
Robinson, Wilson v. 110
Rodgers, Aguilar v. 374
Ross v. Norvel, 191
Rowles v. Ryal, 144
Ryan, Kewley v. 372, 381, 385 389
Russel, Hamilton v. 89
Royal Ex. Ass. Co. Carter v. 388, 393
Rudyard's Case, 453

S

Saul, Bernard v. 184
Savage, Adams v. 198, 322
Scott v. Hornsby, 95
Sears, Fenwick v. 320, 321
Secretan, Christie v. 377
Setter, Gregory v. 191
Shaines, Morris's lessee v. 38
Shaw v. Bull, 118
Shelly, Walton v. 286
Shelton v. Barbour, 191
Shoolbred, M'Master v. 374
Sidebotham, Right v. 102, 112
Simm v. Johnson, 94
Smith v. Harman, 198
Smith, Williams v. 381
Smiton, Fletcher v. 103, 112
Spendlove v. Aldrich, 255
State of Georgia v. Brailsford. 457

	page
Stead, Telfair *v.*	227
Stitt *v.* Wardell,	372, 378
Stoddert, Delaney *v.*	381
Story *v.* Strettell,	374
Stot *v.* Vaughan,	372, 390
Strettell, Story *v.*	374
Strithorst *v.* Græme,	176
T	
Tanner *v.* Morse,	118
——— *v.* Wyse,	118
Tate *v.* Wellings,	184
Telfair *v.* Stead,	227
Thellusson *v.* Fletcher,	376
Thorowgood, Lechmere *v.*	361
Timewell, *v.* Perkins	117
Tuffnell *v.* Page,	135
Turner, Chapman *v.*	226
Twisden, Markant *v.*	118
Twyne's Case,	80, 89, 365
U	
U. S. *v.* Fisher,	82
——— *v.* King,	88
——— *v.* LaVengeance,	92, 174
——— *v.* Hamilton,	449
——— *v.* More,	449
V	
Vernon, Jackson *v.*	145
Vaughan, Stot *v.*	372, 390
W	
Walcot *v.* Hall,	257
Walton, Darwent *v.*	227
——— *v.* Shelly,	286
Wardell, Stitt *v.*	372, 378
Ware *v.* Hylton,	457
Way *v.* Modigliani,	370, 378
	381, 389
Wellings, Tate *v.*	184
Wilkins *v.* Despard,	341
Williams *v.* Smith,	381
Wilmer, Foster *v.*	378, 393
	398
Wilson *v.* Robinson,	110
Winch *v.* Keely,	202
Wise, Murray *v.*	111
Withered, Roberts *v.*	340, 346
	348, 359, 361
Withers, Goss *v.*	374
Wooldridge *v.* Boydell,	370
	378, 381, 389
Worseley *v.* Demattos,	84
Wright, Bristow *v.*	199
———, Frogmorton *v.*	103
	112
Wymark's Case,	201
Wyse, Tanner *v.*	118
Y	
Young, Clarke *v.*	315

CASES REPORTED.

	page
BARRY, Manella v.	415
Bell, Hopkirk v.	454
Brooke, Peyton v.	92
Buddicum v. Kirk,	293
Burford *ex parte*,	448
Butts, Hodgson v.	140
C	
Caldcleugh, Gordon v.	268
Codman, Wilson v.	193
Cooke v. Graham,	229
Curtiss, Strawbridge v.	267
D	
Dixon v. Ramsay,	319
Dobypes v. United States,	241
Douglass, Huidekoper v.	1
Douglass v. M'Allister,	298
E	
Eve, Hannay v.	242
F	
Faw v. Roberdeau,	174
Field v. Milton,	514
G	
Gadsby, Levy v.	180
Gordon v. Caldcleugh,	268
Graham, Cooke v.	229
Grundy, United States v.	337
H	
Hallet v. Jenks,	210
Hannay v. Eve,	242
Harris v. Johnston,	311
Heth, United States v.	399
Hodgson v. Butts,	140
Hooe, United States v.	73
Hopkirk v. Bell,	454
Huidekoper v. Douglass,	1
J	
Jackson, Winchester v.	514
Jenks, Hallet v.	210
Johnston, Harris v.	311
K	
Kirk, Buddicum v.	293
Knox, Sands v.	499
Knox v. Summers,	496
L	
Lambert v. Paine,	97
Law, Ray v.	179
Lawrason v. Mason,	492
Levy v. Gadsby,	180
M	
Maley v. Shattuck,	458
Manella v. Barry,	415
Marine In. Co. v. Tucker,	357
Mason, Lawrason v.	492
M'Allister, Douglass v.	298
M'Ferran v. Taylor,	270
Milledge, Milligan v.	220
Milligan v. Milledge,	220
Milton, Field v.	514
Montalet v. Murray,	249
Moore, United States v.	159
Murray, Montalet v.	249
N	
Negro London, Scott v.	324
P	
Paine, Lambert v.	97
Peyton v. Brooke,	92
R	
Ramsay, Dixon v.	319
Randolph v. Wirc.	503
Ray v. Law,	179
Roberdeau, Faw v.	174

	page
S	
Sands *v.* Knox,	449
Scott *v.* Negro London,	324
Shattuck, Maley *v.*	458
Silsby *v.* Young,	249
Simms *v.* Slacum,	300
Slacum, Simms *v.*	300
Speed, Wilson *v.*	283
Strawbridge *v.* Curtiss,	267
Summers, Knox *v.*	496
T	
Taylor, M'Ferran *v.*	270
Tucker, Marine In. Co. *v.*	357
U	
United States, Dobynes *v.*	241
United States *v.* Grundy,	337
——— *v.* Heth,	339
——— *v.* Hooe,	73
——— *v.* Moore,	159
W	
Ware, Randolph *v.*	503
Wilson *v.* Codman,	193
——— *v.* Marine In. Co.	187
——— *v.* Speed,	283
Winchester *v.* Jackson,	514
Wise *v.* Withers,	331
Withers, Wise *v.*	331
Y	
Young, Silsby *v.*	249

ERRATA.

Page 7, line 22, for "mentes" read *mentis.*
— 20, — 2, for "10th" read *9th.*
— 25, — 5, for "in" read *on.*
— 47, — 20, for "positio" read *possessio.*
— 47, — 34, for "or" read *nor.*
— 49, — 5, between "because" and "land," insert *the.*
— 59, — 27, for "and that," read *and yet say that.*
— 66, — 24, for "there" read *thereon.*
— 92, — 23, erase "had."
— 98, — 7, for "each" read *such.*
— 98, — 8, after "with" insert *the.*
— 153, — 14, erase "*that.*"
— 153, — 19, after "declares" insert *that.*
— 153, — 21, for "is" read *are.*
— 194, — 18, for "found" read *joined.*
— 227, — 23, for "§ 10" read 510.
— 228, — 20 & 21, for "yet it is cause" read *yet it is no cause*
— 293, — 7, for "of a bond" read *on a bond.*
— 296, — 27, for "does appear" read *does not appear.*
— 313, — 27, for "plaintiff" read *defendant.*
— 337, — 28, for "Baltimore" read *Maryland.*
— 351, — 10, after "act" insert *as.*
— 362, — 12, for "first case" read *first place.*
— 366, — 11, for "port entry" read *post-entry.*
— 451, — 35, for "on" read *no.*
— 454, — 22, for "an" read *on.*
— 500, — 33, erase the words "*to this court.*"

SUPREME COURT U. S.

FEBRUARY TERM, 1805.

HUIDEKOPER'S LESSEE *v.* DOUGLASS.*

THIS was a case certified from the Circuit Court of the United States, for the district of Pennsylvania, in which the opinions of the judges of that court were opposed.

HUIDEKOPER'S LESSEE v. DOUGLASS.

Under the act of Pennsylvania, of 3d April, 1792, for the sale of the vacant lands, &c. the grantee, by warrant of a tract of land, lying north and west of the rivers Ohio and Alleghany, and Conewango Creek, who by force of arms of the enemies of the United States, was

The action was an ejectment to try the title of the "*Holland Company*" to a very large tract of land in Pennsylvania, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, purchased of that state under the act of Assembly of the 3d of April, 1792. Which act is as follows, viz.

An Act for the sale of the vacant Lands within this Commonwealth.

Whereas, the most valuable lands within this Commonwealth, included within the purchase made from the native Indians in the year one thousand seven hundred and sixty-eight, have been taken up, located, and appropriated

* Present, *Marshall, Chief Justice; Cushing, Paterson, Washington* and *Johnson*, Justices.

HUIDEKOPER'S LESSEE v. DOUGLASS.

for the use of divers purchasers, at prices heretofore established by law, and those which remain unsold and unsettled, being inferior in quality or situation, cannot be sold at the same prices: And whereas the prices fixed by law for other lands belonging to the commonwealth are found to be so high, as to discourage actual settlers from purchasing and improving the same:

prevented from settling and improving the said land for the space of two years from the date of his warrant, but during that time persisted in his endeavours to make such settlement and improvement, is excused from making such actual settlement as is described in the ninth section of the act, and the warrant vests in such grantee a fee-simple.

Section I. *Be it therefore enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That from and after the passing of this act, the price of all the vacant lands within the limits of the purchase made of the Indians in the year one thousand seven hundred and sixty-eight, and all preceding purchases, excepting always such lands as have been previously settled upon or improved, shall be reduced to the sum of fifty shillings for every hundred acres; and the price of vacant lands, within the limits of the purchase made of the Indians, in the year one thousand seven hundred and eighty-four, and lying east of Alleghany river and Conewango creek, shall be reduced to the sum of five pounds for every hundred acres thereof; and the same shall and may be granted to any person or persons applying for the same at the price aforesaid, in the manner and form accustomed under the laws heretofore enacted, and now in force.

Sec. II. *And be it further enacted by the authority aforesaid*, That from and after the passing of this act, all other lands belonging to this commonwealth, and within the jurisdiction thereof, and lying north and west of the rivers Ohio and Alleghany, and Conewango creek, excepting such parts thereof as heretofore have been, or hereafter shall be, appropriated to any public or charitable use, shall be, and are hereby, offered for sale to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of seven pounds ten shillings for every hundred acres thereof, with an allowance of six per centum for roads and highways, to be located, surveyed, and secured to such purchasers, in the manner herein after mentioned.

Sec. III. *And be it further enacted by the authority aforesaid*, That upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid, to the Secretary of the Land office, which application shall contain a particular description of the lands applied for, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding four hundred acres, requiring the Surveyor-General to cause the same to be surveyed for the use of the grantee, his heirs and assigns, for ever, and make return thereof to the Surveyor-General's office, within the term of six months next following, the grantee paying the purchase money, and all the usual fees of the Land-office.

Sec. IV. *And be it further enacted by the authority aforesaid*, That the Surveyor-General shall, with the approbation of the Governor, divide the lands thus offered for sale into proper and convenient districts, in such manner as he may think expedient, so that the boundaries of each district, either natural or artificial, may be known, and appoint one Deputy-Surveyor for each district, who shall give bond and security, as is customary with other Deputy-Surveyors in this Commonwealth, and shall reside within, or as near as possible, to his respective district; and every such Deputy-Surveyor shall, within sixty days next after his appointment, certify to the Surveyor-General, the county, township, and place, where such Deputy-Surveyor shall keep his office open, for the purpose of receiving warrants, in order that all persons who may apply for lands as aforesaid, may be duly informed thereof; and every Deputy-Surveyor, who shall receive any such warrant, shall make fair and clear entries thereof in a book, to be provided by him for that purpose, distinguishing therein the name of the person therein mentioned, the quantity of land, date thereof, and the day on which such Deputy Surveyor shall receive the same, which book shall be open at all seasonable hours to every applicant, who shall be entitled to copies of any entries therein, to be certified as such, and signed by the Deputy-Surveyor, the party paying one quarter of a dollar therefor.

HUIDEKOPER'S LESSEE v DOUGLASS.

Sec. V. *And be it further enacted by the authority aforesaid*, That the Deputy-Surveyor shall, at the reasonable request and proper cost and charges of the respective grantees, in such warrants named, proceed to survey the lands in such warrants described, as nearly as may be, according to the respective priorities of their warrants; provided, that they shall not, by virtue of any warrant, survey any tract of land, that may have been actually settled and improved prior to the date of the entry of such warrant with the Deputy-Surveyor of the district, except for the owner of such settlement and improvement; and having perfected such surveys, shall enter the same in a book, to be kept by the Deputy Surveyor, and to be called the survey-book; and the same book shall remain in his office, liable to be inspected by any person whatsoever, who shall demand to see the same, upon the payment of eleven pence for every search; and the Deputy Surveyor shall cause copies of any such survey to be made out, and delivered to any person, upon the payment of one quarter of a dollar for each copy.

Sec. VI. *And be it further enacted by the authority aforesaid*, That in making any survey by any Deputy-Surveyor, he shall not go out of his proper district to perform the same, and that every survey made by any Deputy-Surveyor without his proper district shall be void and of non effect; and the Surveyor-General and his deputies, are hereby severally directed and enjoined to survey, or cause to be surveyed, the full amount of land contained and mentioned in any warrant, in one entire tract, if the same can be found, in such manner and form, as that such tract shall not contain in front on any navigable river or lake, more than one half of the length or depth of such tract, and so conform the lines of every survey in such manner as to form the figure or plot thereof, as nearly as circumstances will admit, to an oblong, whose length shall not be greater than twice the breadth thereof; and in case any such survey should be found to contain a greater quantity of land, than is mentioned in the warrant on which it shall be made, so that such excess be not more than one-tenth of the number of acres mentioned in such warrant, besides the usual allowance for roads and highways, the return thereof shall, nevertheless, be

admitted, under the warrant, provided the party procuring such return to be made, shall forthwith pay to the Receiver-General of the Land office, the price or value of such excess or overplus land, at the same rate at which he paid for the land mentioned in the warrant.

Sec. VII. *And be it further enacted by the authority aforesaid*, That every Deputy-Surveyor to be appointed by virtue of this act shall, within the month of February in the next year, make and return into the office of the Surveyor-General, plots of every survey which he shall have made in pursuance of any warrant, connected together in one general draft, so far as they may be contiguous to each other, with the courses and distances of each line, the quantity of land contained in each survey, and the name of the person for whom the same was surveyed; and every succeeding year he shall make a like return of the surveys made in the year preceding.

Sec. VIII. *And be it further enacted by the authority aforesaid*, That the Deputy-Surveyor of the proper district shall, upon the application of any person who has made an actual settlement and improvement on lands, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, and, upon such person paying the legal fees, survey and mark out the lines of the tract of land to which such person may, by conforming to the provisions of this act, become entitled by virtue of such settlement and improvement: *Provided*, That he shall not survey more than four hundred acres for such person, and shall, in making such survey, conform himself to all the other regulations by this act prescribed.

Sec. IX. *And be it further enacted by the authority aforesaid*, That no warrant or survey, to be issued or made in pursuance of this act, for lands lying north and west of the rivers Ohio and Alleghany, and Conewango creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating, at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and

residing, or causing a family to reside thereon, for the space of five years next following his first settling of the same, if he or she shall so long live; and that in default of such actual settlement and residence, it shall and may be lawful to and for this Commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so often as defaults shall be made, for the time and in the manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this act. *Provided always, nevertheless*, That if any such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued.

Sec. X. *And be it further enacted by the authority aforesaid*, That the lands actually settled and improved according to the provisions of this act, to whosesoever possession they may descend or come, shall be and remain liable and chargeable for the payment of the consideration or purchase money at the rate aforesaid, for every hundred acres, and the interest thereon accruing from the dates of such improvements; and if such actual settler, not being hindered as aforesaid, by death, or the enemies of the United States, shall neglect to apply for a warrant for the space of ten years after the time of passing this act, it shall and may be lawful to and for this Commonwealth to grant the same lands, or any part thereof, to other, by warrants, reciting such defaults; and the grantees, complying with the regulations of this act, shall have, hold and enjoy, the same to them, their heirs and assigns; but no warrant shall be issued in pursuance of this act, until the purchase money shall be paid to the Receiver-General of the Land-Office.

Sec. XI. *And be it further enacted by the authority aforesaid*, That when any caveat is determined by the

Board of Property, in manner heretofore used in this Commonwealth, the patent shall, nevertheless, be stayed for the term of six months, within which time, the party against whom the determination of the Board is, may enter his suit at common law, but not afterwards; and the party, in whose favour the determination of the Board is, shall be deemed and taken to be in possession, to all the intents and purposes of trying the title, although the other party should be in actual possession, which supposed possession, shall, nevertheless, have no effect upon the title; at the end of which term of six months aforesaid, if no suit is entered a patent shall issue according to the determination of the Board, upon the applicant producing a certificate of the Prothonotary of the proper county that no suit is commenced, or if a suit is entered, a patent shall, at the determination of such suit, issue, in common form, to that party in whom the title is found by law; and in both cases, the patent shall be and remain a full and perfect title to the lands against all parties and privies to the said caveat or suit; saving, nevertheless, to infants, femes coverts, persons beyond sea, non compotes mentes, and others, under disabilities, their respective rights, until twelve months after such disabilities are removed.

Sec. XII. *And be it further enacted by the authority aforesaid*, That no direct taxes shall be levied, assessed, or collected, for the use of this Commonwealth, upon or from any of the lands or tenements lying north or west of the purchase made of the Indians, in the year one thousand seven hundred and sixty-eight, or the personal estate found thereupon, for the full space or term of ten years, from and after the passing of this act.

Sec. XIII. *And be it further enacted by the authority aforesaid*, That the following tracts of land shall be reserved for the use of the Commonwealth, that is to say, at Presqu'isle, formed by Lake Erie, the island or peninsula which forms the harbour, and a tract extending eight miles along the shore of the lake, and three miles in breadth, so as to include the tract already surveyed, by virtue of a resolution of the General Assembly, and the whole of the harbour formed by the said Presqu'isle, at the mouth of Harbour creek, which empties into the

HUIDEKOPER'S LESSEE v. DOUGLASS.

Lake Erie, and along the shore of the lake, on both sides of said creek, two thousand said acres.

Sec. XIV. *And be it further enacted by the authority aforesaid*, That all the lands within the triangle on Lake Erie, purchased from the United States, shall be taken and deemed, and they are hereby declared to be, within the limits of the county of Alleghany.

Sec. XV. *And be it further enacted by the authority aforesaid*, That it shall and may be lawful to and for the holder or holders of any unsatisfied warrant and warrants, heretofore issued for lands, agreeably to the seventh section of the act, entitled, "An Act to alter and amend an Act of Assembly, entitled, "An Act for opening the Land-Office, for granting and disposing of the unappropriated lands within this State," passed on the twenty-first day of December, in the year one thousand seven hundred and eighty-four, to locate the quantity of land for which such unsatisfied warrant and warrants was and were granted, in any district of vacant and unappropriated land within this Commonwealth; provided the owner or owners of such unsatisfied warrants shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Alleghany river and Conewango creek, are made subject by this act, the said recited act, or any other act or acts of the General Assembly, to the contrary thereof in anywise notwithstanding.

WILLIAM BINGHAM,
Speaker of the House of Representatives.
SAMUEL POWELL,
Speaker of the Senate.

Approved, April 3d, 1792.
THOMAS MIFFLIN,
Governor of the Commonwealth of Pennsylvania.

The points upon which the opinions of the Judges of the court below were opposed, were certified to be as follows, viz.

1. Whether, under the act of the legislature of Pennsylvania, passed on the third day of April, one thousand

seven hundred and ninety-two, entitled, "An act for the sale of the vacant lands within this commonwealth," the grantee, by warrant of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the tenth day of April, one thousand seven hundred and ninety-three, the date of the said warrant, until the first day of January, one thousand seven hundred and ninety-six, but who, during the said period, persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the ninth section of the said law prescribes, to vest a title in the said grantee.

2. Whether a warrant, for a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, granted in the year one thousand seven hundred and ninety-three, under and by virtue of the act of the legislature of Pennsylvania, entitled, "An act for the sale of the vacant lands within this commonwealth," to a person who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the date of the said warrant until the first day of January, one thousand seven hundred and ninety-six, but who, during the said period, persisted in his endeavours to make such settlement and residence, vests any, and if any, what title in or to the said land, unless the said grantee shall, after the said prevention ceases, commence, and within the space of two years thereafter, clear, fence and cultivate at least two acres for every hundred acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling the same, the said grantee being yet in full life.

3d. Whether a grantee in such a warrant as aforesaid, who has failed to make such settlement as the enacting clause of the said ninth section requires, and who is not within the benefit of the proviso, has thereby forfeited his right and title to said land, until the commonwealth has

HUIDEKOPER'S LESSEE v. DOUGLASS.

taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the possession of said land in ejectment against a person who at any time after two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land, and has ever since been in possession of the same.

Dallas, for the plaintiff, contended for three general propositions.

1. That a warrantee (meaning thereby a person claiming under a warrant from the commonwealth) who has been prevented by force of arms of the enemies of the United States, from *improving*, *settling* and *residing* on the land, but has persisted in his endeavours to do so, during *two* years from the date of his warrant, is forever and totally released, by the operation of the proviso, from the obligation of making the improvement, settlement and residence described in the enacting clause of the 9th section of the law.

2. If not forever and totally excused under the specified circumstances, yet the warrant vests in such warrantee and his heirs, a title to the land under one of three aspects—1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavours to accomplish an improvement, settlement and residence, although his endeavours should not be successful—2d. Provided he accomplishes the settlement and improvement within *two* years, and the residence within *five* years, after the prevention by hostilities ceased. 3d. Provided he has accomplished the improvement, settlement and residence, at any time before the commonwealth has taken advantage of the forfeiture.

3. The inceptive title of the warrantee gives a right of possession which can only be defeated by an act of the commonwealth, taking advantage of a forfeiture for non-compliance with the terms of the grant.

I. Point.

In order to understand the act of 1792, it will be necessary to take a view of the situation of the State of

Pennsylvania at that period. Her finances were embarrassed, and an Indian war existed on her frontiers. Hence she had two great objects in view—the protection of those frontiers, and the accession of wealth to her treasury. To accomplish the first, no means were so sure as to establish on the frontiers a firm, hardy, and vigilant population, bound by their dearest interests to watch and repel the predatory incursions of the Indians. And to attain the second, no means presented themselves so obviously as the sale of the vacant lands.

Although the war was raging at the time when the act passed, yet negotiations were pending, and peace was expected.

The general provisions of the act, therefore, especially those which relate to settlement and residence, are predicated upon a state of peace, while the legislature also took care to provide for a state of war.

The extent of that provision is the principal subject of litigation.

Without resorting to the words, but considering the law as a contract, what are the motives and ideas which may be reasonably ascribed to the parties?

1st. As to the state.

1. The settlement might be prevented by two means; public calamity, or negligence in the grantee. For the one, it was just that the State should answer; for the other, the grantee. 2. It was unreasonable for the State to require the same from him who should be prevented, as from him who should not be prevented from making a settlement. A mere enlargement of time diminishes, but does not obviate the objection. It does not put both on an equal footing. The man who has spent years in fighting and toiling to obtain a settlement, is still to do just as much as the man who has staid at home by his fire-side till war is over, and then purchases his warrant. The former has no credit for his toil and wounds. This construction is evidently contrary to the spirit of the act, which was to

HEIDEKOPER'S LESSEE v. DOUGLASS.

gain hardy adventurers, who should join their exertions to those of the State and of the United States, to subdue the Indians; for it totally destroys all motive for such exertions. The State, therefore, might say, and, without doubt, meant to say to the war-warrantee, that a persistance in the endeavour to settle, during the period prescribed, shall be accepted in lieu of actual settlement. That the man who has actually accomplished the settlement and residence in time of peace, and he who shall have persisted in his endeavours to settle and reside for the stipulated time, during a state of war, but who has been prevented by the enemy from accomplishing his settlement and residence, are equally meritorious, and shall be put on the same footing.

2d. As to the warrantee.

Would he purchase during the war, if he was liable to forfeit his warrant although he persists during the limited time, and if all his expenses and dangers were to go for nothing, and if at the end of the war he would be in the same situation as if he had remained at home?

The situation of the State, then, called for money, population and improvement. The means were a sale of the land, subject to settlement, if not prevented by a public calamity.

The words and spirit of the act are conformable to these ideas.

The title is, for the sale of vacant lands.

The preamble states, that the prices at which they have been heretofore held were found so high as to discourage *actual settlers* from purchasing and improving.

The second and third sections contain the offer of the lands for sale, and the ninth describes the terms.

On this overture, companies and individuals became purchasers. Among the rest, the Holland Company, in April, 1792, and August, 1793, purchased 1162 tracts of 400 acres each, which, by losses upon re-surveys,

and bounties to actual settlers, are reduced to 776 tracts, which have cost the company 222,071 dollars and 10 cents for purchase money, and (up to the year 1802) 202,000 dollars in expenses, endeavours to settle, and actual improvements. The *Population Company* also expended nearly the same amount. The consequence was, that the public treasury was supplied; a bank was established, which furnishes revenues adequate to the whole expenses of the government, so that no taxes have been since imposed; industry and improvements have been stimulated, and the State has advanced rapidly in wealth and prosperity.

The persistance and prevention of the Holland Company are admitted.

The treaty made with the Indians in 1795, is considered as the epoch from which the two and the five years mentioned in the ninth section begin to run. But there was still further prevention by distance, by the season, (for the treaty was ratified in the winter) by intruders, (who were pushing in upon the lands under pretence that the warrants were forfeited by want of settlement within the two years) and by the construction of the act given by the Board of Property.

How then are the terms of the contract to be expounded? Not by the words, (for they are inconclusive and repugnant) but by the nature of the transaction.

By the third section, a fee simple is granted; but the ninth section annexes a condition precedent. The warrant shall not vest *any* title "unless," &c.

The nature of the transaction, however, gives a possessory title, and an usufructuary property, at least for the two and the five years, else the warrantee could not go and make a settlement. It is always spoken of in the act as a *grant*. It may be devised, sold, descend, be taken in execution, &c. By the 9th section, what is given can only be divested by *default*. The whole estate does not remain in the grantor until performance of the condition.

HUIDEKOPER'S LESSEE v. DOUGLASS.

But the settlement and residence for the time mentioned is not a *sine qua non* to vest an absolute title. There are cases within the ninth section, in which the title becomes absolute, altnough the residence shall not have been completed. The words of the act are, "reside thereon for the space of five years next following his first settling of the same, *if he shall so long live.*" If the warrantee, having begun his settlement, should die before the expiration of the five years, his title is complete. So if he puts a family on the land to reside, and dies before the end of the term, and the family quits its residence before the expiration of the five years, the title is absolute. So if an actual settler shall by force of arms of the enemies of the United States be driven from his settlement. And so, (as we say) "if any grantee" "shall" by like force "be prevented from making an actual settlement," "and shall persist ir his endeavours to make such actual settlement," during the time allowed for making the same. that is for *two* years, "he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." In each of these cases the condition is released. If the legislature meant any thing less, words were not wanting in which to express their ideas, and here was an opportunity of using them.

The particular words of the proviso are important.

"If any grantee shall be *prevented.*" This implies an attempt and failure. "And shall *persist*," implying still the want of success. "In his *endeavours*"—still holding up the idea that the thing is not accomplished—"*to* make," not *until he make*, not persist to make, but persist in his *endeavours to make*, implying a continued attempt, not a performance. "Shall be entitled to have and to hold, in the same manner *as if.*" Here the words *as if*, necessarily imply that the thing itself is not done. The first part of the section gives the lands, if the thing is done, but the proviso also gives it, in a certain case, if it be not done, in the same manner as if it had been done. They who contend that the persistance must continue until the object is accomplished, make the legislature speak this absurd language—Persist until

the settlement has been made, and you shall have the land in the same manner as if the settlement had been made. But we make them speak much more rationally—If you are prevented by the enemy from making the settlement, but persist in your endeavours for two years, you shall have the land in the same manner as if the settlement had been made. We will take your endeavours for success. If settlement and residence were necessary in all cases, the proviso is useless. If the legislature meant by the proviso only to extend the time, they have been very unfortunate in their language, for there is no expression which indicates such an idea, and it is contradicted by the preceding part of the section, by which the commonwealth reserve the right to grant new warrants as often as defaults shall be made *for the time* and in the manner aforesaid. No time is expressed in the act but the two and the five years. If the time is to be enlarged, who shall say how long? There is no provision for trying by a jury the question, what is a reasonable time.

The act contemplates but two cases. An actual settlement within the time, or a prevention during the time by the act of God, or of the public enemy.

In both cases the title was to be absolute.

The same reason that releases the warrantee who dies, applies more strongly to the warrantee prevented by the enemy, and the tenth section puts them both on the same footing.

Let us consider what is required by the ninth section, and what is relinquished by the proviso.

It requires, within two years, a settlement, by clearing two acres for every hundred, by erecting a habitation, and by residing five years.

Here is evidently a confusion of terms, by requiring a settlement consisting of five years' residence, to be accomplished in *two* years.

There are also other absurdities in the same section, equally glaring. Thus it is declared that in default of such actual settlement, the commonwealth may issue new warrants to *other* actual settlers; and that if such actual settler shall be prevented from making such actual settlement, he shall be entitled in the same manner as if the actual settlement had been made.

2. What is relinquished.

The condition of residence is released by the death of the warrantee, and prevention releases both residence and settlement.

The enacting part of the section may be considered as a covenant to settle; and the proviso as a covenant to convey in case of prevention.

II. Point.

If persistance for two years does not forever and totally release the condition of settlement, yet the warrant vests a title under one of three aspects.

1st. Provided, during and for a reasonable time after the period of prevention, he persists in his endeavours to accomplish an improvement, settlement and residence, although his endeavours should not be successful.

To suppose the title to be forfeited, although an accomplishment of the condition has been prevented by the enemy, is to make the proviso of no use whatever.

But giving a use to the proviso, and supposing it to mean an extension of time, every thing is at sea. Every case would have a different rule, and decisions would vary with every jury. No case could be decided without a law suit.

But if you allow the warrantee to gain a title by persisting during the war, and for a reasonable time after, although without success, you render the law intelligible, and give effect to every part.

This construction comports with the peculiar expressions of the act, and is justified by the nature and equity of the case.

Endeavours during war would be more expensive than success in a time of peace, and equally beneficial to the State. By this means also you put the war-warrantee and the peace-warrantee upon an equal footing.

But the legislature fixed a positive period, and left nothing to discretion.

Who shall change the nature of the contract? Who give discretion to courts and juries? Who substitute endeavour for performance, in reference to any other time than the legislature contemplated?

2d. The second aspect is, provided he persists after the war, and accomplishes the improvement in two years, and continues the residence for five years from the cessation of the prevention.

This is what is contended for on the other side, but this is not the express contract which fixes the time, as well as the acts which are to be done.

It is not a contract which can be implied; for an undertaking to act in two years from the date of the warrant, does not imply an undertaking to act in two years after a war, which may be fifty years from the date of the warrant.

The proviso contemplates no new act, no new epoch, but under the specified circumstances gives a title as if the act had been done in the time prescribed.

This construction would make the proviso a mere mockery. It would place the warrantee, who had toiled through the dangers of the war, at a heavy expense, in no better situation than if he had used no exertions at all.

3d. The third aspect is, provided he persists during and after the war, and perform the conditions at any

HUYDEKOPER'S LESSEE v. DOUGLASS.

time before the commonwealth takes advantage of the forfeiture.

This regards the case as a condition subsequent, the estate continuing after the contingency, until the grantor enters and claims.

But this is contrary to the words, which call for endeavours, not performance.

This construction destroys all limitation of time.

Upon the whole, there is no clear, safe, equitable and satisfactory construction, but that which supposes the condition to be released by the impossibility of performance within the time prescribed.

III. Point.

The inceptive title of the warrantee gives a right of possession which can only be defeated by an act of the State.

All forfeitures are to be construed strictly. And where compensation can be made, they are never enforced in equity.

The forfeiture claimed is entitled to no favour. The contract itself was ambiguous, and rendered more so by official misinterpretations.

The price has been paid. Time, labour and money have been expended in improvements, and attempts to settle. The prevention has been by a public calamity, not by private negligence.

The operation of the forfeiture is dishonourable to the State. She seizes the lands with all their amelioration, to sell them again to a stranger.

Even the State herself, therefore, ought not to be countenanced in taking advantage of the forfeiture.

But what pretext can justify a stranger in intruding upon the possession of the warrantee?

This is the case of a trespasser who thrusts himself in upon the land, pretending that the warrantee has forfeited his title.

Is every person, who chooses to intrude, to be the judge whether the possessor has forfeited his title? This would encourage forcible entries and riots; riot would grow to rebellion. The peace of the commonwealth is at stake.

No man can acquire a title by his own tort.

But turn to the words of the act.

"That in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to *other* actual settlers, for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof," &c.

There must be proof of default; the party must be heard. The commonwealth *may*, not *shall*, grant new warrants.

It is said, however, that they are to be issued to *other actual settlers*; which gives a right to any person to enter on a forfeiture.

The terms of the act, as well as the nature of the transaction, show that the case of a *warrantee*, and not a mere *settler*, is meant.

It supposes a new warrant, where an old one had issued.

Actual settler, is a *descriptio personæ*. It does not mean a man who has completed, but who contemplates an actual settlement. This appears from the manner in which the terms *actual settler* are used in the pre-

HUIDEKOPER'S LESSEE v. DOUGLASS.

amble, and in the 5th, 8th and 10th sections of the act, and even in the 10th section itself.

The commonwealth may grant new warrants to *other* actual settlers. Other than whom? Other than the actual settlers who had failed to make an actual settlement in the manner described in the beginning of that section.

It means a person who had purchased with an intention, or under a stipulation to make an actual settlement.

There is no express authority given to any person to enter on a warrantee. Can it be implied by saying that the state may grant to another actual settler?

Her act must constitute the forfeiture of the old title.

Her act must grant the new.

E. Tilghman, on the same side,

Confined his argument principally to the support of the proposition, that a persistance for *two* years after the date of the warrant, and in time of war, in endeavours to make a settlement, gave the same title as if the actual settlement had been made and continued.

He contended that revenue and population were equally the objects of the legislature in passing the act. It ought not, therefore, to be construed with a sole view to population.

The act, like a will, ought to be so construed as to carry into effect the intention of the legislature, and to give operation to all its parts.

To understand the true meaning of the proviso of the 9th section, it is necessary to distinguish between *settlement* and *residence*.

The warrantee is, by the first part of the section, to make a settlement, "by clearing, fencing, and cultivating at least two acres for every hundred, and by

erecting thereon a messuage for the habitation of man." Thus much was to be done in *two* years, and this may with propriety be called "*actual settlement.*" But this alone was not sufficient to give a title. The party must also "reside, or cause a family to reside thereon five years next following his first settling of the same, if he shall so long live."

Residence is superadded to settlement, which is the principal requisite.

It is absurd to say that residence is comprehended in settlement, because settlement must be within two years from the date of the warrant; but the residence is to continue five years following the first settlement. The smaller number (2) cannot include the larger number, (5) which must be the case if residence is a part of settlement. It certainly is not. But it is a requisite additional to settlement, and which must be complied with to complete the title. Settlement may be begun and completed in the last three months of the two years. Residence, the other requisite, is to commence with the inception of the settlement, and to continue five years, unless the party die, so that settlement is one thing, and residence another. Unless they are different, how can the one commence from the other? If residence be a part of settlement, and not a distinct member of the condition, the death of the grantee within two years from the date of the warrant, would vest a complete title. A construction plainly inconsistent with the views of the legislature.

That residence is considered a distinct part of the condition, is evident from other parts of the section. Thus it says—"And that in default of such actual settlement *and* residence, it shall and may be lawful," &c. Again, "reciting the original warrants, and that actual settlements *and* residence *have* not been made."

The proviso also considers settlement and residence as distinct. The party is to persist in endeavours to *make* an actual settlement; and if he does so persist, is to hold and enjoy in the same manner as if the actual settlement had been made and *continued.* If actual

HUIDEKOPER'S LESSEE v. DOUGLASS.

settlement included residence, why say *continued*? Settlement is considered as a distinct thing, separately existing, and continued by residence. If the settlement is not made in *two* years, *in peace*, is there not a forfeiture? If so, residence is *another* essential. If residence is a part of settlement, it must be had in *two* years; but residence is to be *five* years from the first settlement. Then if you abolish two years as incompatible with five years, you set all at large; no time is prescribed for either settlement or residence; because residence is not to be five years from the date of the warrant, but from the first settlement, which may, on this construction, be at *any* time. There is no means to reconcile the whole but to construe settlement to be *one* thing to be done *in two years* from the date of the warrant; and residence to be another, to continue five years from the first settling.

Such then were the requisites to a complete title.

But at the time of making the act there was an Indian war, which might probably last more than two years. It was necessary, then, for the legislature to do justice as well to the warrantee who paid money, as to the actual settler: one of whom might, by the continuance of the war, be prevented from commencing and completing settlement and residence; the other be driven from settlement and residence actually commenced.

The provision is, that if the actual settler (with or without warrant) shall be driven therefrom, or the warrantee be prevented from making such actual settlement, "and shall persist in his endeavours to make such actual settlement *as aforesaid*" "then, in either case, he and his heirs shall be entitled to have and to hold the said lands in the same manner as if the *actual settlement* had been *made* and *continued*."

The plaintiff and defendant are at issue upon a great question:

Is the condition to be performed according to the terms of the enacting clause, at *some* time?

If this is determined in the negative, in what time is the matter, substituted in lieu of what was required by the enacting clause, to be performed?

These questions are distinct and independent of each other—not to be blended together in argument, and if blended, will introduce the utmost confusion.

In considering the *proviso*, it is natural to inquire, 1st. Who are the objects of relief against the condition. 2d. On what terms is such relief to be granted; and, 3d. What is that relief.

1st. The objects of relief under the proviso certainly are persons not having done what was necessary under the former part of the section, to complete their titles—who had not united settlement and residence; settlers without warrant—and warrantees having commenced settlements or not.

2d. If any such "actual settler, or any grantee shall be prevented by force of arms of the enemies of the U. S. from making *such actual settlement*, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case,

3d. "He and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and *continued*."

The terms of relief are, persisting in endeavours to make such actual settlement as aforesaid.

The whole question is as to the legitimate meaning of "persist in his endeavours," &c. For if the grantee or actual settler complies with the proper construction as to the thing intended to be done, the condition is done away.

It is contended that the party must persist until settlement and residence are actually achieved.

This we say is utterly inconsistent with the letter and spirit of the proviso. Had the legislature intended this,

it would have been so expressed, and might have been readily done, by a declaration that, during war, time should not run against the warrantee or settler.

Instead of which, a substitute for settlement and residence is plainly introduced. That substitute is a persisting in endeavours to *make* such actual settlement as aforesaid. Instead of requiring a persisting in endeavours *until* settlement and residence actually *obtained* or *made*, the law contemplates something short of settlement and residence, which being performed, was to operate in the same manner *as if* the actual settlement, and residence had been made and *continued*. Such actual settlement, in the proviso, is considered as distinct from residence; and to it, *as such*, the proviso relates. And if the party presists in his endeavours to make *such* actual settlement as aforesaid (that is, clear, fence, cultivate, and build, not reside) then he is to hold in the same manner as if the actual settlement had been made *and continued;* to wit, by residence. In the proviso, residence is no where contemplated except where the effect of persistance in endeavours is declared to be, to hold "in the same manner as if," &c. The legislature having thus plainly considered settlement and residence as different things, have declared that persistance in endeavours to attain the *one* shall be equivalent to the actual accomplishment of *both*.

The proviso affords relief on the ground, and solely on the ground, that settlement and residence were not had.

How strange is *their* construction! If the actual settler or warrantee persists in his endeavours until he actually makes a *settlement* with residence he shall hold the land *as if* actual settlement had been made and continued. This renders all the words "*in the same manner as if*" &c. entirely nugatory.

This is not the case to which the proviso applies. It applies only to a case in which settlement and residence had not taken place, but in which, from a proper consideration of circumstances, the party was to hold *as if*, &c. looking to something other which is to be *as if*. Nullum simile est idem. *As if* does not mean *the same*.

Persisting in endeavours is all the proviso requires. If unsuccessful they are still *endeavours* within the meaning of the proviso. Attaining the end is not the only evidence of persisting in endeavours; else all endeavours must necessarily be successful, as, without success, in their principles, there can be no endeavours persited in.

If attaining the end was to be absolutely necessary, why did not the legislature expressly prescribe the *end* and not the *means?* Or rather, why, having already prescribed the *end*, in the former part of the section, did they say any thing of the *endeavour* (the means) in the proviso?

By the construction on the other side, the only *benefit* the grantee or actual settler gains from the proviso is *time* during the actual existence of the impossibility to perform; so that if the then raging war should last ten years, and the party persist in his endeavours the whole time, his title would still be incomplete without actual settlement and residence.

The legislature never intended to impose such ruinous hardships on persons whose money they had taken, or on actual settlers. If time only was their object, why not give it absolutely during the war, without requiring a circumstance that must be attended with great expense and trouble to the party? Why make endeavours and persistance necessary, unless intended as a substitute for settlement and residence?

On these principles the proviso does the party more harm than good; it was better for him at once to fall a victim to the strict letter of the condition. Had these principles been fairly and clearly avowed and stated in the act, would any man, *flagrante bello*, have paid his money for warrants? No. The State would have remained involved in debt till the close of the war.

But it is said, you are not to persist in your endeavours during war, but you are to begin after the peace.

There is nothing of this sort in the law—and why, after peace, is persistance required? Why should not the enact-

ing clause, after some certain time, *recur in full force*, if this was the intention? Why not say that during war and for such a time after peace the condition shall not run against you?

Surely, the persistance in endeavours to make a settlement refers to the time during which a hindrance existed; and cannot apply to a time when there would be nothing to hinder the compassing the thing itself.

What is the relief granted?

They say it is only *time*—a *suspension* of the forfeiture during the war. There is no idea of this kind held up in the law. Instead of dispensing with a forfeiture, it dispenses with the condition. It declares that if something is done it shall amount to a performance of the condition and the party shall hold in the same manner *as if* the condition itself had been performed.

It is not enough to *say* that the general intention and spirit of the law is only to suspend the forfeiture for a time. Such spirit and intention must be shown and extracted from the bowels of the act.

By our construction, viz. that two years' persistance from the date of the warrant gives a complete title, every thing is rendered intelligible and consistent, and every word of the act has its proper meaning and effect. But upon theirs all *is* confusion, and inconsistency. They confound the larger with the smaller number—they make the legislature speak without any meaning, and they reject whole passages of the law.

If it is settled that persistance in endeavours to make actual settlement is a performance of the condition, how long is such persistance to be?

Surely, *two* years only from the date of the warrant, that being the time within which, by the enacting clause, the settlement is to be made, and as persistance is a substitute for settlement, must be for the same term and not longer.

The act affords no other terms, no other rule of construction. Persistance cannot apply to the five years' residence because there can be no residence without settlement; and when there had been a fruitless perseverance for two years in endeavours to attain a settlement, there cannot, in the nature of things, be a persistance to attain residence; for settlement being out of the question, there cannot be residence, which presupposes settlement, and which cannot exist without settlement.

Besides, the proviso excludes all ideas of endeavour being applied to residence—they are attached to *settlement*, and are to operate *as if* actual *settlement* had been made and *continued*.

Consequently, endeavours are only to be commensurate with the time required for settlement, viz. two years from the date of the warrant.

M'Kean, (Attorney general of Pennsylvania) *contra*.

The defeat of *Harmer* in 1790, and of St. Clair in 1791, show that the power of the United States, aided by that of Pennsylvania was insufficient to protect that part of the country. The view of the legislature, therefore, was the *settlement*, not the *sale* of the lands. They reduced the price from 80 to 20 dollars per 100 acres. Settlement was not a condition subsequent, but precedent; or rather, it was a part of the consideration of the sale. With the same view the legislature reduced the size of the tracts from 1000 to 400 acres, so that on every tract of 400 acres they might have a soldier. It was not their intention that a large tract should be purchased by any one person or body of men. They meant to have a family upon every tract of 400 acres. The Holland company purchased 1162 tracts, which was to produce 1162 soldiers, distributed among the same number of tracts. The object was, that the country should be settled during the war, if possible, so as to form a barrier against the incursions of the Indians. But it is said a peace was in contemplation. If so, why did they enact the proviso—why stipulate for immediate settlement—why oblige purchasers to *persist* in their endeavours? Immediate settlement was the object; and if so, they could not mean to limit the perseverance to

HUIDEKOPER'S LESSEE v. DOUGLASS.

two years; they meant a perseverance as long as there was any obstacle. Every thing in the act shows this to be their meaning.

The preamble states that the price at which they had been held was so high as to discourage, not purchasers, but *actual settlers*.

The 2d section offers the lands "for sale to persons who will cultivate, improve, and settle the same, or cause the same to be cultivated, improved, and settled".

The 3d section declares, that "upon the application of any person *who may have settled and improved*, or is *desirous to settle and improve*, a *plantation* within the limits aforesaid, to the Secretary of the Land Office, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding 400 acres, requiring the surveyor to cause the same to be surveyed for the use of the grantee, his heirs and assigns forever."

The 5th section prohibits the deputy surveyor, by virtue of *any* warrant, to survey any tract of land that may have been actually *settled and improved* prior to the date of the entry of such warrant with the deputy surveyor of the district, except for the owner of such *settlement and improvement*.

The 8th section authorises the deputy surveyor, upon application of any person who has made an *actual settlement and improvement*, to survey and mark out the lines of the tract to which such person may, by conforming to the provisions of this act, become entitled by virtue of such *settlement and improvement*, provided it does not exceed 400 acres.

The 10th section provides, that the lands thus actually *settled and improved*, according to the provisions of this act, shall remain liable for the purchase money and interest from the dates of the improvements. And if such actual settler, not being hindered as aforesaid by death, or the enemies of the United States, shall neglect to apply for a warrant in ten years after the pass-

ing of this act, the commonwealth may grant the same lands to others, by warrants reciting such defaults.

The 9th section contains a condition precedent, and if it be not strictly complied with, the purchaser has not title. It is a part of the contract made with his eyes open. The act must be construed as a contract. The several parts must be considered together. The second and third must refer to the ninth section, and be controuled by it.

What is a condition precedent? It is a condition to be performed before the estate can vest. As if a man grant that if *A.* pay 100 marks before such a day, he shall have the land. No title will vest until the 100 marks are paid.

It has been considered as a condition precedent by every judge who has passed sentence upon it. Thus, *Judge Yeates*, in giving his opinion in the case of the *mandamus*, says, "It is admitted *on all sides*, that the terms of actual settlement and residence, are, in the first place, *precedent conditions*, to the vesting of absolute estates in these lands, and I cannot bring myself to believe that they are dispensed with by unsuccessful efforts, either in the case of warrant-holders or actual settlers."* The condition is not dispensed with but in

* This question has been agitated in a variety of forms in the State of Pennsylvania, and a great degree of sensibility is said to have been excited upon the subject. In the year 1800 a rule was obtained in the Supreme Court of Pennsylvania, by the Holland Company, upon the Secretary of the Land Office, to show cause why a *mandamus* should not be awarded, commanding him to prepare and deliver patents for various tracts of land for which they had obtained warrants under the act of April 3d, 1792. The judges delivered their opinions in the following terms:

SHIPPEN, Chief Justice.—The legislature, by the act of 3d April, 1792, meant to sell the remaining lands of the State, particularly those lying on the north and west of the rivers Ohio and Alleghany. The consideration money was to be paid on issuing the warrants. They had, likewise, another object, namely, that if possible, the lands should be settled by improvers. The latter terms, however, were not to be exacted from the grantees at all events. The act passed at a time when hostilities existed on the part of the Indian tribes. It was uncertain when they would cease; the legislature, therefore, contemplated, that warrants might be taken out during the exist-

the case of prevention by death, or by force of arms of the enemies of the United States. The question here arises, is the prevention and perseverance for two years equivalent to a performance of the condition? Is the will to be taken for the deed?

ence of these hostilities, which might continue so long, as to make it impossible for the warrantees to make the settlements required, for a length of time; not, perhaps, until after these hostilities should entirely cease. Yet, they make no provision that the settlements should be made within a reasonable time after the peace; but expressly within two years after the dates of the warrants. As, however, they wished to sell the lands, and were to receive the consideration money immediately, it would have been unreasonable, and, probably, have defeated their views in selling, to require settlements to be made on each tract of four hundred acres, houses to be built, and lands to be cleared, in case such acts should be rendered impossible by the continuance of the Indian war. They, therefore, make the proviso, which is the subject of the present dispute, in the following words:—"*Provided always, nevertheless*, That if any "such actual settler, or any grantee, in any such original or succeeding warrant, shall, by force of arms of the enemies of the "United States, be prevented from making such actual settlement, "or be driven therefrom, and shall persist in his endeavours to make "such actual settlement as aforesaid, then, in either case, he and "his heirs shall be entitled to have and to hold the said lands, in "the same manner as if the actual settlement had been made and "continued."

When were such actual settlements to be made: The same section of the act which contains the above proviso, gives a direct and unequivocal answer to this question—"Within the space of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force or reasonable dread of the enemies of the United States, and it was evident that the parties had used their best endeavours to effect the settlement, then, by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with, and their title to the lands was complete, and patents might issue accordingly. It is contended, that the words "Persist in their endeavours" in the proviso, should be extended to mean, that if within the two years they should be prevented by the Indian hostilities from making the settlement, yet, when they should be no longer prevented by those hostilities, as by a treaty of peace, it was incumbent on them then to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms, (and they would not, perhaps, have been unreasonable) but they have not done so: they have expressly confined the time of making such settlements to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for, from the words they have used, in which there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made use of the word "endeavours," which supposes a possibility, at least, if not a probability, as things

What is the settlement intended? We say it includes five years' residence. The proviso speaks of "*such actual settlement as aforesaid*," thereby referring to the description of settlement in the former part of the section, that is, "by clearing, fencing and cultivating, at least

then stood, of those endeavours failing on account of the hostilities; and would, therefore, have expressly exacted actual settlements to be made, when the purchasers should no longer run any risk in making them.

The State having received the consideration money, and required a settlement within two years, if not prevented by enemies; and in that case dispensing with the condition of settlement and residence, and declaring that their title shall be then good and as effectual as if the settlement had been made and continued; I cannot conceive they could mean to exact that settlement at any future indefinite time. And although it is said they meant that condition to be indispensable, and that it must be complied with in a reasonable time, we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves.

It is urged, that the main view of the legislature was to get the country settled, and a barrier formed; this was, undoubtedly, one of their views, and for that purpose, they have given extraordinary encouragement to individual settlers; but they had, likewise, evidently another view, that of increasing the revenue of the State, by the sale of the lands. The very title of the act is, "for the sale of the vacant lands within this commonwealth;" this latter object they have really effected, but not by the means of the voluntary settlers: it could alone be effected by the purses of rich men, or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued upon the presumption, that the words "persist in their endeavours," relate to the grantees, as well as the settlers; but, in considering the words of the proviso, it may be well doubted, whether they relate to any other grantee or settler, than those who have been driven from their settlements; the word "persist," applies very properly to such: the words of the proviso are, "If such actual settler, or any grantee, shall, by force of arms of the enemies of the United States, be prevented from making such settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement; then, in either case, he and his heirs shall be entitled," &c. Here, besides, that the grammatical construction of referring the word "persist," to the last antecedent, is best answered, but the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence, one relates to the grantees, who, it is supposed, may be prevented from making their settlements: The other to the settlers who are supposed to be driven away from the settlements. The latter words, as to them, are proper; as to the grantees, who never began a settlement, improper. The act

HUIDEKOPER'S LESSEE v. DOUGLASS.

two acres for every "hundred, erecting thereon a messuage for the habitation of man, *and residing*, or causing a family to reside thereon for the space of *five* years next following his first settling of the same."

says, *in either case*, that is, if the grantees are prevented from making their settlements, or if the settlers are driven away, and persist in their endeavours to complete their settlements, in either case they shall be entitled to the land.

I will not say this construction is entirely free from doubt—if it was, there would be an end of the question.

But taking it for granted, as it has been done at the bar, that the words relate to the grantees, as well as the settlers; yet, although inaccurate, with regard to the former, it seems to me, the legislature could only mean to exact from the grantees, their best endeavours to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then entitled to their patents. If the legislature really meant differently, all I can say, is, that they have very unfortunately expressed their meaning.

The propriety of awarding a mandamus, is another question, which I mean not to discuss, as I presume a decision of a majority of the Court will make it unnecessary.

YEATES, Justice.—I have long hoped and flattered myself, that the difficulties attendant on the present motion, would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision; the question has often occured to our minds, under the act of 3d of April, 1792, which has so frequently engaged our attention in our western circuits.

The Holland Company have paid to the State, the consideration money of one thousand one hundred and sixty-two warrants, and the surveying fees, on one thousand and forty-eight tracts of land; besides making very considerable expenditures by their exertions, honourable to themselves, and useful to the community, (as has been correctly stated) in order to effect settlements. Computing the sums advanced, the lost tracts, by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands; it is said, that averaging the whole, between two hundred and thirty and two hundred and forty dollars, have been expended by the company, on each tract of land they now lay claim to.

The Indian war which raged previous to, and at the time of the passing of the law, and until the ratification of the treaty at Fort Granville, must have thrown insurmountable bars in the way of

By the proviso no time is limited for the *persisting*. We say it means persisting *with effect;* otherwise the object of the legislature would be totally defeated if the war should continue two years after the dates of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances: the scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions: Besides, it is obvious, that settlements, in most instances, could not be made, until the lands were designated and appropriated by surveys, and more especially so, where warrants have express relation to others, depending on a leading warrant, which particularly locates some known spot of ground.

On the head of merit, in the Holland Land Company's sparing no expense to procure settlements, I believe there are few dissenting voices beyond the mountains: and one would be induced to conclude, that a variety of united, equitable circumstances, would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion, upon the abstract legal question—whether, if a warrant-holder, under the act of 3d of April, 1792, has begun to make his actual settlement and is prevented from completing the same, "by force of arms, of the enemies of the United States, or is driven therefrom," and shall make new endeavours to complete the same; but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with and extinguished?

I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons, collected from the body of the act itself.

1. The motives inducing the legislature to enact the law, are distinctly marked in the preamble, that "the prices fixed by law for other lands," (than those included in the Indian purchase of 1768) are found to be so high, as to discourage *actual settlers* from purchasing and *improving* the same." 3 State laws, 209.

2. "The lands lying north and west of the rivers Ohio and Alleghany, and Conewango creek, are offered for sale to persons who will *cultivate*, *improve* and *settle* the same, or *cause* the same to be cultivated, improved and settled, at and for the price of £7 10, for every hundred acres thereof." By § 2. The price of lands is thus lowered, to encourage actual settlements.

3. By § 3. "Upon the application of any person who may have settled or improved, or is desirous to settle and improve, a plantation within the limits aforesaid; there shall be granted to him a warrant not exceeding four hundred acres," &c.

the warrants. Besides, the proviso would be repugnant to the enacting clause, and therefore void. It only provides that the incipient title should not be lost during the war, if thereby the settlement was prevent-

The application granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form all such warrants have issued.

4. By § 5. "Lands *actually settled and improved*, prior to the date of the entry of a warrant with the Deputy Surveyor of the district, shall not be surveyed thereon; except for the owner of such settlement and improvement."

This marked preference of actual settlers over warrant-holders, who may have paid their money into the treasury for a particular tract; even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intentions of the legislature.

5. By § 8. "The Deputy Surveyor of the district, shall, upon the application of any person, who has made an actual settlement and improvement on these lands, survey and mark out the lines of the tract of land, not exceeding four hundred, for such applicant."

The settlement and improvement alone, are made equivalent to a warrant; which may be taken out by section 10, ten years after the time of passing this act.

6. I found my opinion, on what I take to be the true and legitimate construction of the § 9; in the close of which is to be found the proviso, from whence spring all the doubts on the subject.

It has been said at the bar, that three different constructions have been put on this section.

1. That if the warrant-holder has been prevented by Indian hostilities, from making his settlement within two years, next after the date of his warrant, and until the 22d of December, 1795; (the time of ratification of General Wayne's treaty) the condition of settlement and residence is extinct and gone.

2. That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavours, to make an actual settlement and residence for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the condition: And,

3. That in all events, except the death of the party, the settlement and residence, shall precede the vesting of the complete and absolute estate.

ed. Every person who claims under this act must be an actual settler. It does not say that if the grantee, or actual settler shall be prevented, or driven away, he shall hold; but if prevented, or driven away, and he shall *persist*, then he shall hold.

Though such great disagreement has obtained, as to the true meaning of this § 9, both sides agreed in this, that it is worded very inaccurately, inartificially, and obscurely. Thus, it will be found towards the beginning of the clause, that the words "*actual settlement*," are used in an extensive sense, as inclusive of residence for five years; because its constituent parts are enumerated and described, to be by "*clearing, fencing and cultivating*, at least two acres for every hundred acres, contained in one survey; erecting thereon, a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years, next following his first settling the same, if he or she shall so long live." In the middle of the clause, the same words are used in a more limited sense, and are coupled with the expressions "and residence," and in the close of the section, in the proviso, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense, as they first conveyed; because the terms "such actual settlement," used in the middle of the section, are repeated in the proviso, and refer to the settlement described in the foregoing part: and the words "actual settlement, as aforesaid," evidently relate to the enumeration of the qualities of such settlement:— Again, the confining of the settlement to be within the space of two years, next after the date of the warrant, seems a strange provision. A war with the Indian natives subsisted when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay, could not be ascertained generally.

Still I apprehend that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction, said to have been made of the proviso in this ninth section; because it rejects as wholly superfluous, and assigns no operation whatever, to the subsequent expressions, "if any grantee shall persist in his endeavours," &c. which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me to militate against the general spirit and words of the law, and distorts its great prominent features in the passages already cited, and for other reasons which I shall subjoin. I adhere to the third construction, and will now again consider the § 9. It enacts, in the first instance, that "no warrant or survey for lands, lying north and west of the rivers Ohio and Alleghany, and Conewango creek, shall vest any title, unless the grantee has, prior to the date of such warrant, made, or caused to be made; or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, &c. *Provided always, nevertheless*, That if any such settler, or any grantee, in

What is persisting? Buying implements? No.—Going on the land? We do not contend for that. But still it is something, and who is to determine what it is? It is a fact which must be decided by a jury in every case; which would be productive of endless litigation.

any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid; then, in either case, he and his heirs, shall be entitled to have and to hold the said lands, in the same manner, as if the actual settlement had been made and continued."

"Persist" is the correlative of attempt or endeavour, and signifies "hold on," "persevere," &c.. the beginning words of the section, restrict the settlement, "to be within two years *next after* the date of the warrant, *by clearing*, &c. and *by residing* for the space of five years, *next following* his first settling of the same, if he or she shall so long live," and in default thereof, annexes a penalty of forfeiture in a mode prescribed; but the proviso relieves against this penalty, if the grantee is prevented from making such settlement by force, &c. and shall *persist in his endeavours* to make *such* actual settlement, as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the proviso declares, that *persisting*, &c. shall be equivalent to a continuation of the settlement.

To be more intelligible, I paraphrase the ninth section thus:—Every warrant-holder shall cause a settlement to be made on his lands within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture, by a new warrant. Nevertheless, if he shall be interrupted or obstructed by external force, from doing these acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time, after the removal of such force, until those objects are accomplished, no advantage shall be taken of him for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question, proposed by the counsel of the Holland Company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground the 11th April, 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defence; and then fixes his residence as near the spot, as he can consistently, with his personal safety, does the warrantee lose all pretensions of equity? Or, suppose he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the Indian hostilities; but is, at length, compelled to remove by a supe-

When the prevention ceased, they were to settle in a reasonable time; otherwise the purchaser of 1793 would be in a better situation than the purchaser of 1796, because the former would get his title without the condition of settlement.

rior force; is all to go for nothing, and must he necessarily begin again? I answer to both queries, in the negative; By no means.—The proviso supplies the chasm of successive years of residence; for every day and week he resides on the soil, he is entitled to credit in his account with the commonwealth: but, upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement;—although a charity cannot take place according to the letter, yet it ought to be performed *cy-pres*, and the substance pursued. 2 *Vern.* 266. 2 *Fonb.* 221.

It has been objected, that such a contract with the State, is unreasonable, and hard on those land-holders, and ought not to be insisted upon: it will be said, in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences. The only question is, whether the interpretations given of it be correct or not.

7. A due conformity to the provisions of the act, is equally exacted of those who found their preference to lands on their personal labour, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of land-holders, as to actual settlement and residence; than that the claims of the former, must be limited to a single plantation, and the labour be exerted by them, or under their direction; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. *Addison*, 340, 341.

It is admitted, on all sides, that the terms of actual settlement and residence, are, in the first place, precedent conditions, to the vesting of absolute estates in these lands; and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in the case of warrant-holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controuled by imperious circumstances, was the great criterion, which marked the preference in such cases; and I have seen no reason to alter my opinion.

8. Lastly, it is obvious from the preamble, and § 2, that the settlement of the country, as well as the sale of the lands, were meditated by this law; the latter, however, appears to be a secondary object with the legislature. The peopling of the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute, and I fear tedious, in delivering my opinion, it remains for me to say a few words, respecting those persons who have taken possession of part of these lands, supposing

If the settlement is begun within the two years, and continued for five years, it is sufficient. Until a survey there could be no appropriation; and until appropriation there could be no settlement—and there could be no effectual residence unless the settlement was made

the warrants to be *dead*, according to the *cant word* of the day, and who, though not parties to this suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth, in a method prescribed by law. Innumerable mischiefs, and endless confusion, would ensue, from individuals taking upon themselves to judge when warrants and surveys cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in Morris' lessee v. Neighman and Shaines: "If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing that no persons should take advantage of their own wrong, and that it does not lie in the mouths of men, like those we are speaking of, to say the warrants are dead; we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act."—On the whole, I am of opinion, that the rule should be discharged.

SMITH, Justice.—I have had a full opportunity of considering the opinion delivered by my brother *Yeates*; and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent. I could not hope, indeed, to add to the argument; and I am certain I could not equal the language, which he has used on the occasion.

BY THE COURT. Let the rule be discharged.*

* Since this decision was pronounced, the subject has been revived and agitated in various interesting forms. In the winter of 1801—2, several petitions were presented by the intruders to the legislature, requesting their interposition, but the committee of the Senate to whom these petitions were referred, reported against them and admitted, that the controversy belonged exclusively to the courts of justice. But soon after this report was made, a bill was introduced, which recites the existing controversies, gives a legislative opinion against the claim of the warrantees, and institutes an extraordinary tribunal, to hear and decide between the parties.—The appearance of this bill produced two remonstrances from the Holland Company, but without effect. As soon as it became a law, the Attorney-General and the Counsel for the Company were invited to a conference with the Judges, on the carrying of it into effect; but, upon mature consideration, the Counsel for the Company declined taking any part in the business, and assigned their reasons in a letter addressed to the Judges, dated the 24th of June, 1802. An issue was then formed, by the direction of the Judges, which was tried at Sunbury, on the 25th of November following, before *Yeates*, *Smith* and *Brackenridge*, Justices.

within the two years. Did the legislature mean to dispense with the five years residence, if the settlement could not be made in two years? The 9th section says, the title shall not vest, *unless*, &c. The only difficulty was, to limit the time within which the settlement should be made.

The Charge, as delivered by Mr. *Justice Yeates*, is as follows:—

That the decision of the Court and Jury on the present feigned issue should "settle the controversies arising from contending claims to lands north and west of the rivers Ohio and Alleghany and Conewango creek," is an event devoutly to be wished for by every good citizen. "It is indispensably necessary that the peace of that part of the State should be preserved, and complete justice done to all parties interested, as effectually as possible."—(Close of Preamble to the Act of 2d April, 1802, p. 155.)

We have no hesitation in declaring, that we are not without our fears that the good intentions of the legislature, expressed in the law under which we now sit, will not be effected. We hope we shall be happy enough to acknowledge our mistake hereafter.

It is obvious that the validity of the claims of the warrant-holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of the 3d April, 1792, considered as a solemn contract between the commonwealth and each individual.

The circumstances attendant on each particular case may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act.

The first question proposed to our consideration is as follows:—

Are warrants heretofore granted under the act of the 3d April, 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the said act, at any time before the date of such warrants respectively, or within two years after?

It will be proper here to observe, that on the motion for the mandamus to the late Secretary of the Land-office, at the instance of the Holland Company—the Members of this Court, after *great* consideration of the subject, were divided in their opinions. The Chief Justice seemed to be of opinion, that if a warrantee was "by force of arms of the enemies of the United States, prevented from making an actual settlement, as described in the act, or was driven therefrom, and should *persist* in his endeavours to make such actual settlement thereafter," it would amount to a performance of the

HUIDEKOPER'S LESSEE v. DOUGLASS.

If the settlement is incomplete, he is still to persist. If the improvements are made, but the residence not completed, it is said he is not to persist. But the proviso says, that if the actual settler shall be driven off, and shall *persist*, &c. What is he to persist to do? Some-

condition in law. Two of us (Yeates and Smith) thought, that in all events, except the death of the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant-holder should cause a settlement to be made on his lands, within two years *next after* the date of the warrant, and a residence thereon for five years *next following* the first settlement, on pain of forfeiture, by a new warrant; but if, nevertheless, he should be interrupted or obstructed by the force of the enemy from doing those acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time after the removal of such force, until these objects should be accomplished, no advantage shall be taken of him for the want of a successive *continuation* of his settlement."—To this opinion Judge Brackenridge subscribes.

It would ill become us to say which of these constructions is entitled to a preference. It is true, that in the preamble of the act of the 2d April, 1802, (p. 154) it is expressed, that "it appears from the act aforesaid, (3d of April, 1792) that the commonwealth regarded a full compliance with those conditions of settlement, improvement and residence, as an indispensable part of the purchase or consideration of the land itself." But it is equally certain that the true test of title to the lands in question must be resolved into the legitimate meaning of the act of 1792, extracted *ex visceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered in Bank; yet, if a different interpretation of the law shall be made by courts of a competent jurisdiction *in the dernier resort*, I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question be, are titles under warrants issued under the law of the 3d of April, 1792, for lands north and west of the rivers Ohio and Alleghany and Conewango creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement, and residence, required by the law, at any time before, or within two years after, the dates of the respective warrants, *in time of profound peace, when they were not prevented from making such actual settlement by force of arms of the enemies of the United States*, or reasonable and well grounded fear of the enemies of the savages?—The answer is ready in the language of the acts before us, and can admit of no hesitation.

"No warrant or survey for those lands shall vest any title, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall, within the space of two years next after the date of the same, make or cause to be made, an actual settlement

thing certainly which remained to be done; and nothing remained to be done but to complete his residence. But if he persist in his endeavours to do this, the time during which he is prevented and persists, shall go to his credit. Hence there must be a persistance for five years at least.

thereon, by clearing, &c. and in default thereof, it shall and may be lawful to and for the commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof," &c.—(Act of the third of April, 1792, sec. 8.) For "the commonwealth regarded a full compliance with these conditions of settlement and residence as an indisputable part of the purchase or consideration of the lands so granted." (Preamble to act of 1802.)

But if the true meaning of the question be—whether, under *all* given or supposed circumstances of *peace* or *war*, of times of *perfect tranquillity* or *imminent danger*, such warrants are not *ipso facto* void and dead in law, *we are* constrained to say, that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant taken out early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the land applied for, by all the necessary preparation of provisions, implements of husbandry, labourers, cattle, &c. cannot, with any degree of personal safety, seat himself on the lands within two years after the date of the warrant, and by reason of the just terror of savage hostilities. Will not the proviso in the 9th section of the act of 3d April, 1792, excuse the *temporary* non-performance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no controul?

Or, suppose another warrant, depending, in point of description, on other leading warrants, which the district Surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey until the two years were nearly expired, and the depredations of the Indians should intervene for the residue of the term, will not this also suspend the operation of the forfeiture?—Nothing can be clearer to *us*, than that the terms of the proviso embrace and aid such cases; and independent of the strong expressions made use of, *we* should require strong proof to satisfy our minds that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.

It is said in the books, that conditions rendered impossible by the act of God, are void. Salk. 170. 2 Co. 79. *b.* Co. Lit. 206. *a.* 290. *b.* 1 Roll. Ab. 449. *l.* 50. 1 Fonb. 199.

The warrant gave a right to enter the land, to survey it, and to make the settlement. But this right would be forfeited under the former part of the section, if not exercised in two years.

This was the right which the proviso meant to protect, and nothing more. This is the right which is saved

But *conditions precedent* must be strictly performed to make the estate vest, and though become impossible, even by the act of God, the estate will not vest—aliter of *conditions subsequent*, 12 Mod. 183. Co. Lit. 218. *a*. 2 Vern. 339. 1 Ch. Ca. 129. 138. Salk. 231. 1 Vern. 183. 4 Mod. 66.—*We* desire to be understood to mean, that the "Prevention by force of arms of the enemies of the United States," does not, in *our* idea, absolutely dispense with and annul the conditions of actual settlement, improvement and residence, but that it *suspends* the forfeiture by protracting the limited periods. Still, the conditions must be performed *cy pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavours to make such actual settlement, improvement and residence, until the conditions are fairly and fully complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretence of being an actual settler, shall seat himself on lands previously warranted and surveyed within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act.—If the party himself is the cause wherefore the condition cannot be performed, he shall never take advantage. Co. Lit. 206. Doug. 661. 1 Roll. Ab. 454. pl. 8. Godb. 76. 5. Vin. 246. pl. 25.

We trust that *we* have said enough to convey *our* sentiments on the first point. Our answer to the question, as proposed, is, that such warrants may or may not be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of *our* opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by its own peculiar circumstances.

The second question for decision is, are the titles that have issued from the Land-office under the act aforesaid, whether by warrant or patent, good and effectual against the commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded on the certificates of two Justices of the Peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence, required by the said act, could not be complied with?

by persisting as long as the prevention continues. But when the prevention ceases, the ultimate condition of settlement is still to be performed. As the law does not require impossibilities, a reasonable time after cessation

It was stated in evidence on the motion, for the mandamus, and proved on this trial, that the Board of Property being desirous of settling a formal mode of certificate on which patents might issue for lands north and west of the rivers Ohio and Alleghany, and Conewango creek, required the opinion of Mr. Ingersoll, the then Attorney-General thereon; on due consideration, a form was afterwards adopted on the 21st of December, 1797, which was ordered to be published in the Pittsburgh Gazette, and patents issued of course, on the prescribed form being complied with.

The received opinion of the Supreme Executive Magistrate, the Attorney-General, the Board of Property, and of a respectable part of the Bar, (whose sentiments on legal questions will always have great and deserved weight) at that day, certainly was, that if a warrant-holder was prevented by force of arms of the enemies of the United States from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavours to make such settlement, that the condition was extinguished and gone. *Persisting in endeavours*, was construed to mean something—attempts, essays, &c.—but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some it was thought, that the endeavours were only to be *commensurate as to the time* of making the actual settlement, and were tantamount, and should avail the parties "in the same manner as if the actual settlement had been made and continued."

The decisions of the court in Morris's lessee v. Neighman and others, at Pittsburgh, May, 1799, tended to make the former opinion questionable; and two of the justices of the Supreme Court adopted a different doctrine, in their judgment between the Holland Company and Tenche Coxe.

In the argument in that case, it was insisted by the counsel for the plaintiffs, that the Board of Property in their resolves, and the Governor by his patent represented the commonwealth pro hac vice; and that interests vested under them which could not afterwards be defeated.

We cannot subscribe hereto. If the conditions of settlement, improvement and residence are indispensable at all events; they become so by an act of the different branches of the legislature.—The Governor, who has a qualified negative in the passing of laws, cannot *dispense* with their injunctions; it cannot be said that this case falls within the meaning of the 9th section of the second article of the constitution. "The Governor shall have power to remit fines and forfeitures and grant reprieves and pardons except in case of impeachment." It relates merely to penalties consequent on public offences, nor can it be pretended that the Board of Property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the

HUIDEKOPER'S LESSEE v. DOUGLASS.

of the war must be allowed to make the settlement. We say two years is that reasonable time, because that was the time originally fixed by the contract which was predicated upon the idea that there was no obstacle.

law of 1792 cannot, with any degree of justice, be ascribed to the Governor or Board of Property for the time being. They considered themselves in their different functions virtually discharging their respective duties in carrying the act into execution according to the generally received opinion of the day; they never intended to purge a forfeiture if it had really accrued, nor to excuse the non-performance of a condition if it had not been complied with; agreeably to the public will expressed in a legislative contract.

The rule of law is thus laid down in England. A false or partial suggestion by the grantee to the king *to the king's prejudice*; whereby he is deceived, will make the grant of the king void. Hob. 229. Cro. E. 632. Yel. 48. 1 Co. 44. *a*. 51. *b*. 3. Leon. 5. 2. Hawk. 398. Black. 226. But where the words are the words of the king, and it appears *that he has only mistaken the law, there he shall not be said to be so deceived to the* avoidance of the grant per Sir Samuel Eyre; Just. Ld. Ray. 50. 6 Co. 55. b 6. b. accord. But if any of the lands concerning which the question arises, become forfeited by the omission of certain acts enjoined on the warrant-holders, they do not escheat to the Governor for the time being, for his benefit, nor can he be prejudiced as Governor by any grant thereof; they become vested in the whole body of the citizens as the property of the commonwealth subject to the disposition of the laws.

We are decidedly of opinion, that the patents, and the prevention certificates recited in the patents, are not conclusive against this commonwealth, or any person claiming under the act of 3d of April, 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the Land-officers. But we also think that the circumstance of recital of such certificates will not, *ipso facto*, avoid and nullify the patent, if the actual settlement, improvement and residence, pointed out by the law, can be established by other proof.

We must repeat on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2. Here we feel ourselves irresistibly impelled to mention a difficulty which strikes our minds forcibly. *Our* reflections on the subject have led us to ask ourselves this question on our pillows:—What would a wise, just and independent Chancellor decree on the last question?—Executory contracts are the peculiar objects of Chancery jurisdiction, and can be specifically enforced by Chancery alone—Equity forms a part of our law, says the late Chief Justice truly. 1 Dall. 213.

But it is said that the commonwealth alone can enter for the forfeiture, and that there is no private right of entry.

But if this is a condition precedent, no right ever vested, and, therefore, there can be no forfeiture. The

If it had appeared to such a Chancellor, by the pleadings or other proofs, that the purchase money had been fully paid to the government by the individual for a tract of land under the law of the 3d April, 1792—that times of difficulty and danger had intervened—that sums of money had been expended to effect an actual settlement, improvement and residence, which had not been accomplished fully—that by means of an unintentional *mistake* on the part of the State-officers in granting him his patent—not led to that mistake by any species of fraud or deception on the part of the grantee—he had been *led into an error* and *lulled into a confidence* that the conditions of the grant had been *legally* complied with, and, therefore, he had remitted in his endeavours therein:—Would not he think, that under all these circumstances, thus combined, equity would interpose and mitigate the rigid law of forfeiture, by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the United States, and peace with the Indian nations, both which render an immediate settlement of the frontiers, in some measure, less necessary than heretofore?

But it is not submitted to us to draw the line of property to these lands; they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated. We are confined to the wager on the matters before us, and on both questions we have given you *our* dispassionate sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess and feel an ardent desire that peace and tranquillity should be preserved to the most remote inhabitants of this commonwealth.

The same question was again agitated in the Circuit Court of the United States, in April, 1803, in the case of Balfour's lessee v. Meade. The charge of Judge Washington to the jury, was as follows:

WASHINGTON, Judge.—The importance of this cause led the court to wink at some irregularities in the argument of it at the bar, which has tended to protract it to an unreasonable length.—Depending on the construction of laws of the state, and particularly on that of the 3d of April, 1792, it had at first the appearance of a difficult and very complicated case. It is not easy at the first reading of a long statute, to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was formed on Saturday before we parted, open, however, as it always

HUIDEKOPER'S LESSEE v. DOUGLASS.

only right given was a permission within two years to enter, for the purpose of surveying and settling; but this right expired with the two years after the date of the warrant, or of the close of the war.

is to such alterations as ulterior reason and argument may produce.

The better to explain, and to understand the subject, it will be necessary, to take a general view of the different sections of the act of the 3d of April, 1792, upon which this cause must turn. The first section reduces the price of all vacant land, not previously settled or improved within the limits of the Indian purchase made in 1768, and all precedent purchases to 50*s.* for every 100 acres—that of the vacant lands within the Indian purchase made in 1784, lying east of Alleghany river and Conewango creek to £5. to be granted to purchasers in the manner authorised by former laws.—The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Alleghany and Conewango, to persons who will *cultivate, improve and settle* the same, or cause it to be done at the price of £7. 10*s.* per hundred acres, to be located, surveyed and secured as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by *settlement*, and to all except those lying north and west of the Ohio, Alleghany and Conewango, by *warrant without* settlement.

The third section, referring to all the above lands, authorises applications to the Secretary of the Land-office by any person having settled and improved, or who was desirous to settle and improve a plantation *to be particularly described*, for a warrant for any quantity of land, not exceeding 400 acres; which warrant is to authorise and require the Surveyor general to cause the same to be surveyed, *and to make return of it*, the grantee paying the purchase money and fees of office.—The eighth section, which I notice in this place, because intimately connected with the third section, directs the Deputy Surveyor to survey and mark the lines of the tract upon the application of the *settler*. This survey, I conceive, has no other validity than to furnish the *particular description* which must accompany the application at the Land-office for a warrant.

The fourth section, amongst other regulations, protects the title of an *actual settler*, against a warrant entered with the Deputy Surveyor posterior to such actual settlement.

The ninth section, referring *exclusively* to the lands north and west of the Ohio, Alleghany and Conewango, declares, "that no warrant or survey of lands within that district, shall give a title unless the grantee has, prior to the date of the warrant, made or caused to be made, or shall, within two years after the date of it, make or cause to be made an actual settlement, by clearing, fencing and cultivating two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing, or causing a fami-

The land is to be granted to other *actual settlers*—this term is explained in the 5th and 10th sections, and means those who were actually on the land and had begun their settlement. The commonwealth could not grant these lands to actual settlers unless there was

ly to reside thereon for five years *next* following his first settling the same, if he shall so long live, and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case, as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Alleghany and Conewango, could be acquired in no other manner than by *actual settlement*—no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or if not so preceded by actual settlement, the warrant would give no title unless it were followed by such settlement within two years thereafter.

The question then is, what constitutes such an actual settler within the meaning and intention of this law, as will vest in him an inceptive title so as to authorise the granting to him a warrant? not a *pedis positio*—not the erection of a cabin, the clearing or cultivation of a field. These acts may deserve the name of *improvements*, but not *settlements*. There must be an occupancy accompanied with a *bona fide* intention to reside and live upon the land, either in person or by that of his tenant—to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this intention be only future, either as to his own personal residence or that of a tenant, then the execution of that intention by such actual residence fixes the date; the commencement of the settlement, and the previous improvements will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them may afford evidence of the *quo animo* with which it was done—of the intention to settle, but neither or all will constitute a settlement, if unaccompanied by residence. Suppose, then, improvements made, the person making them, declaring at the time, that they were intended for temporary purposes of convenience, and not with a view to settle and reside; could this be called an actual settlement within the meaning and intention of the legislature? Surely no: But though such acts against express declarations of the *quo animo* will not make a settlement, it does not follow that the converse of the proposition will—for a declaration of an intention to settle without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff. In 1793, he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five *pens* (for not being covered they do not deserve the name of cabins) and in five, six or seven days, having accomplished this

a private right of entry—for there cannot be actual settlement without actual entry. These expressions of the act imply as complete a right of entry, as a warrant itself. By the act of the 22d of April, 1794, vol. 3. p. 581, 636, no warrant can be obtained for unimproved lands. There must be a previous actual settlement.

work, he returns into the fort to his former place of residence.—Why did he retreat so precipitately? We hear of no danger existing at the time of completing these labours which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins and from inhabiting them?—Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight in the instance of this plaintiff. It is most obvious that the object of his visit to this wilderness was to erect, what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and consequently could not have been intended for a present settlement. He was, besides, an officer in the army, and whilst in that service he could not settle and reside at his cabin, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards—his own statements when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistible, that he did not mean in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right to those lands. It is not pretended, even now, nor is it proved by a single witness, not even by Crouse, who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down for a moment on lands encompassed by dangers from a savage enemy?—I answer no:—at such a time it was very improbable that men would be found rash enough to make settlements.—But yet no title could be acquired without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement was in the spring of 1796, long after the actual *bona fide* settlement of the defendant with his family, for I give no credit to the notice from the plaintiff to the defendant in July, 1795, since, so far from accompanying it with actual settlement, he speaks of a future settlement which, however, was never carried into execution. Every thing which I have said with respect to the 400 acres surveyed in the name of George Balfour will apply *a fortiori* against the three other surveys in the name of Elizabeth Balfour, &c. who, it is not pretended, were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

It is not necessary that any act should be done on the part of the commonwealth, because there is no title to be defeated. But if she is bound to do any act, the act of the actual settler is her authorised act. He cannot be a trespasser, because land was vacant.

If the law then had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made *such a settlement* as the law required, by urging the danger to which any person attempting a residence in that country, would have been exposed. He relies on the proviso to the ninth section of the law which declares "That if any such actual settler, or any grantee in any such original or succeeding warrant shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have, and to hold, the said lands in the same manner as if each actual settlement had been made and continued." Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Grenville was signed on the 3d of August, 1795, and ratified the 22d of December in the same year:—although Meade settled with his family in November, 1795, it is not conclusive proof that there was no danger even then, and at any rate, it would require some little time and preparation, for those who had been driven off, to return to their settlements, and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement, as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other, and this could only have been created by actual settlement preceding the necessity which obliges him to seek the benefit of the proviso —or by warrant.

I do not mean to say that he must have had such an actual settlement as this section requires, to give a perfect title, for if he had built a cabin, and commenced his improvement in such manner, as to afford evidence of a *bona fide* intention to reside, and had been forced off by the enemy, at any stage of his labours, persevering at all proper times afterwards, in endeavours to return, when he might safely do so, he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso which was made for his benefit:—this he has not done.

Decisions in the Supreme Court and in the Common Pleas of this State have been cited at the Bar, two of which I shall notice for the purpose of pointing out the peculiar mark which distinguishes them from the present, and to prevent any conclusions from being drawn

HEIDEKOPER'S LESSEE v. DOUGLASS.

By the 15th section of the act, certain holders of warrants theretofore granted are authorised to locate them, in any district of vacant land in the State, provided that the owners of such warrants "shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of the Alleghany river and Conewango creek, are made subject by *this act*;" that is, they are to make their settlement in two years from the date of their warrants, although their warrants were more than two years old when the act

from what has been said either to countenance or impeach those decisions. The cases I allude to are the Holland Company v. Coke, and the feigned issue tried at Sunbury.

The incipient title under which the plaintiffs claimed in those causes were *warrants* authorised by the third section of the law. The incipient title in the present case is *settlement*. The former was to be completed by settlement, survey, and patent. This to precede the warrant, and for the most distinct explanation of this distinction it will be important to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained who may be an actual settler to demand a warrant, namely one who has gone upon and occupied land with a *bona fide* intention of an actual present residence, although he should have been compelled to abandon his settlement by the public enemies in the first stages of his settlement:—but actual settlement, intended by the 9th section, consists in clearing, fencing, and cultivating two acres of ground at least on each one hundred acres, erecting a house thereon, fit for the habitation of man and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of *improvements*, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso which declares that "if such *actual settler* shall be prevented from making such *actual settlement*," &c. the plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared or fenced any land, and is forced off by the enemies of the United States before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required:—or if the warrant holder who likewise has *an incipient title* although he never put his foot upon the land shall be prevented by the same cause from making these improvements, &c. he too shall be *excused* if, as is required also of the settler, he has persevered in his endeavours to make those improvements, &c.

But what it becomes such a grantee to do before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

passed. This can only be done by giving a construction to this section similar to that which we contend ought to be given to the 9th.

W. Tilghman, on the same side.

The treasury of Pennsylvania was overflowing by the sales of lands between 1784 and 1792. The utmost that has been received from the sale of the lands under the act of 1792, including the tract called the *triangle*, is 500,000 dollars.

There are two descriptions of persons contemplated by the act. 1st. The monied men who could procure settlers—and, 2d. the hardy but poor actual settler, who was to have a credit of ten years for his purchase money. The State did not want money; but a barrier. Population, and not revenue, was the object.—The actual settlement of the land was the *sine qua non*

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys. 1st. Because they are a mere description of the land which the surveyor is authorised by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the Land Office at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and gives notice of the bounds thereof, that others may be able to make adjoining locations without danger of interference; this is not such a survey as is returnable so as to lay the foundation of a patent. 2d. It is not authorised by a warrant. 3d. It was not for an actual settler. 4th. It was not made by an authorised surveyor, if you believe, upon the evidence, that the authority to Steel was antedated, and given after the survey was returned.—Not the warrant. 1st. Because it was not a warrant of title, but of acceptance. 2d. It is not founded on *settlement* but *improvement*, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal valid consequence.

As to the caveat; the effect of it was to close the doors of the Land Office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door, but still the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff, therefore, having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title and your verdict ought to be for the defendant.

The jury found for the defendant.

HUIDEKO-PER'S LESSEE v. DOUGLASS.

of the contract. This appears from the whole tenor of the act itself, as well as from the general circumstances and policy of the State.

The term *actual settler* has two different significations, as used in the act. But there can be no settlement without actual personal residence. An actual settler sometimes means a person who is on the land with an intent to remain—and sometimes it means, fencing, clearing, cultivating, building, and residing five years. By the act of 30th December, 1786, 2 vol. p. 488, it is declared, "that by a settlement shall be understood, an *actual, personal, resident* settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going on the military service of this country during the war." Thus, the word settlement, in the 8th section, is used in its common acceptation. It is merely the inception of title; but the settlement mentioned in the 9th section, is the completion of title. The 9th section was intended to define more exactly what kind of settlement should vest a title.

There being then no settlement without residence, and no time of residence prescribed, except the five years, if there has not been *such* a residence, there has been no residence, and if no residence, no settlement. Settlement, therefore, includes both *improvement* and residence.

Every tract of 400 acres was to be specifically settled. The misfortune of the Holland Company was, that they undertook an impossibility. They had engaged to settle 1162 tracts in two years.

The words "*in default*," &c. show that settlement was the main object. It is improbable that the proviso should be intended totally to defeat the great object of actual settlement; and yet that would be its effect, if the war should continue for two years, which, at the time of passing the act, was a very probable event.

Much reliance has been placed on the words "*as if;*" yet on our construction we allow them their full effect. The settlement was to be made in two years; but says the proviso, if you shall be prevented from making it within two years, and persist until it be accomplished, you shall hold the land *as if* it had been made within the two years according to the enacting clause.

But if persisting two years in time of war gives a complete title, the proviso gives the purchaser in time of war better terms, than the enacting clause gives to a purchaser in time of peace. For the latter is obliged to settle and reside five years, while the former gets the land without any such condition.

But say they, the proviso operates in favour of those only who have been prevented from *improving*. Suppose a man has *improved*, but is driven away before the end of his five years' residence: upon their construction he would lose his land, while that of the man who has done nothing would be saved.

We admit that persistance is not required during the war; for it would be idle to impose unavailing efforts; and the question, *what is persistance?* would open a door to endless litigation. One jury would decide one way and another the contrary. The persisting is to begin when the war ceases.

If actual settlement means only improvement, it would be absurd to say made and *continued*. The word *continued* cannot apply to a thing which when once done is done forever.

There was the same reason for settlement after the war, as during its existence.

Ingersoll, in Reply.

Three questions arise in this case.

1st. Are endeavours persisted in, accepted by the act as a substitute for actual settlement and residence?

HUIDEKOPER'S LESSEE v. DOUGLASS.

2d. For what period must those endeavours be continued, so as to operate as a dispensation with the condition, and amount to such substitute?

3d. If a forfeiture has been incurred, who is to take advantage of it? Actual settlers, or the commonwealth?

1st. Does the act contemplate a persistance in endeavours as a substitute for actual settlement and residence?

It may be necessary first to ascertain the meaning of the words *improvement*, *settlement* and *residence*, both in their general import, and in the appropriate sense in which they are used in the act of 1792.

By *improvement* is understood *clearing*, cultivating, or building on land previously unappropriated. In degree it is infinitely various, from the blazing of a tree with a tomahawk to the highest degree of cultivation.

The first improver has generally been favoured in Pennsylvania. But by the present act he has no preference, except in certain specified cases.

Improvement and settlement are not convertible terms. There may be improvement without settlement, but there cannot be settlement without improvement.

Settlement, in the order of things, is subsequent to improvement, and includes it. It signifies a place on which a person lives after having made an improvement, with or without his family.

Whenever the residence commences, the settlement is computed from the time that the improvement was first tenanted.

The act of assembly adopts words of a previously ascertained import. Warrant, survey, improvement and settlement were an inception of and gave to the warrantee a defeasible title. The patents were not to issue until after five years' residence, when the right was complete and indefeasible.

Payment of the purchase money, warrant and survey gave a defeasible title, inchoate, and possessory. This

right, whatever it was, was liable to forfeiture by a non-compliance, with the terms of the act. *Residence* is a continued settlement.

Improvement, as described in the act, settlement, and residence for five years next following the first settlement, were conditions precedent, not to a possessory, but to an absolute title, unless prevention by war should furnish an excuse.

That improvement, settlement, and residence are used in the act as successive and distinct terms is evident from the act itself.

The 5th section speaks of land settled *and* improved; the 7th of actual settlement *and* improvement—and the 9th of actual settlement *and* residence; and of actual settlement made *and continued.*

The settlement, including such an improvement as is described in the law, is to commence within two years from the date of the warrant. The residence for five years is to commence from the *first settling.* Hence residence is a *continuation* of settlement, not a constituent part of it.

It is true that the legislature, when declaring by what means a settlement shall be made, have included a residence of five years, but the absurdity of including a residence of five years in a settlement to be made in two years, evidently shows that they have admitted an error in their language. It is clear that they do not mean what they say, and the question is, what did they mean to say? To make the least possible alteration in the words so as to express their meaning is to substitute the future tense for the participle—*shall reside*, instead of "*residing.*" This removes all the difficulties of the language and throws great light upon the whole act. The sentence will then read thus: "no warrant shall vest any title in the lands unless the grantee shall, within two years from the date of such warrant, make an actual settlement thereon by clearing, fencing and cultivating at least two acres for every hundred, erecting thereon a messuage for the habitation of man, and *shall reside* thereon for the space of five years next following his first settling of the same." If then the word "residing" be rejected for its substitute, *shall reside*,

there is nothing in the act to justify the proposition that settlement includes five years' residence. There is not another word in the whole act which can suggest such an idea: on the contrary, there are many expressions totally repugnant to the supposition.

Having thus endeavoured to ascertain the meaning of the terms, improvement, settlement and residence, let us consider the meaning of the proviso.

We contend that if the grantee has, by force of arms of the enemies of the United States, been prevented from making an actual settlement within two years after the date of his warrant, having during that time persisted in his endeavours to make such settlement such persistance, though ineffectual, is accepted as a substitute for actual settlement and residence.

We admit that it was with a hope that hardy adventurers would effect an establishment reaching from the Ohio to lake Erie, and cut off the intercourse between the northern and the western Indians, that the assembly of Pennsylvania passed the law in question. It was at a time when the President of the United States was preparing to hold a treaty of peace with the western Indians at Detroit; and in the same session they authorised the employment of a military force to aid and strengthen those who were exposed on the frontiers. We agree that it was to encourage the immediate actual residence of bold but poor men, that the legislature required no purchase money for ten years from such as placed themselves upon the lands and began settlements. To this description of adventurers, they gave a further security by protecting them against all warrants not entered in the books of the surveyor of the district at the time the settler fixed himself on the land. From such as inclined to pay money and operate by placing tenants on the land and giving such tenants bounties for settling, they required a prompt co-operation with the actual settlers in accomplishing the great undertaking.

Let it be recollected that the person who claimed by actual settlement could hold but one tract, the warrant-holder as many as he could pay for, using only differ-

ent names which is perfectly known to be but matter of form. The warrantees were obliged to place a settler on each tract within two years from the date of the warrant, if there should be peace; and at all events to be ready, and make the attempt to support the settlers, if the war should continue. Thus they made it the interest of both descriptions, operators with money, and operators with labour, to make a joint and steady effort for two years to realize the expectations formed of this new barrier.

Here it may not be improper to remind the court that, as the law of Pennsylvania then stood, any alien might purchase and hold land in that state. It has been said that the act was not intended to give an opportunity for speculation; it was certainly intended that foreigners should buy any quantity of land, to the extent of their means of payment.

We do not wish to treat this subject technically—but from the very nature of the property, and the condition, as expressed in the law, the grantee has a right to enter upon the land, maintain suits for its recovery or defence, take the profits, alienate, mortgage it, bind it by suffering judgments, transmit it to heirs, subject only to the conditions of the original grant.

Suppose there had been no proviso: take the enacting clause of the section absolutely by itself, what would be the condition of the holders of warrants, dated in 1792, and 1793?

The warrantee might enter, nay, he was bound to enter, by the nature of his grant—the public enemy prevents him.—The state and the United States are unable to protect him. Without any *laches* in *him*, the performance of the condition becomes impossible by the act of the public enemy. Would the common law say that the estate should be lost?

Are not these conditions what the law terms subsequent? If *precedent*, no interest could arise. The warrantee could exert no act of ownership, until the

HUIDEKOPER'S LESSEE v. DOUGLASS.

conditions were all performed. Here, his performance depends upon his being exclusively the possessor and owner.

In one sense of the word, *all* conditions are precedent; that is, they ought to be performed before the estate becomes absolute; but in law, those only are termed precedent which must be performed before the grantee can enter upon the estate, or recover at law.

Conditions subsequent, refer to cases where the party may immediately take and enjoy the grant, but perform afterwards, having, in the mean time, a qualified title, and the right of possession. Is it not a settled and a reasonable rule, that conditions tending to defeat an estate once qualifiedly vested, shall be construed strictly? and also, that courts will hold a condition to be either precedent, or subsequent, according to the intent of the party creating it, whatever be the form of words, and when the same words may constitute either the one or the other, according to the nature of the case?

We are to show that there is a substitute for actual performance; what that substitute is, will be a subject of inquiry under the 2d head.

The legislature considered *two years* as a reasonable time after the date of the warrant, in which to complete the specified improvements, in a season of peace. A distant wilderness was to be explored; provisions to be collected and transported; clearing, cultivating, and building, where labourers were scarce, were difficult and of slow progress. Actual settlement within two years was of indispensable necessity, in order to obtain full title, unless prevented by the enemies of the United States.

The question then offered itself to the legislature, shall the continuance of the war release the condition, and endeavours be equivalent to performance?

We contend that the principle of the proviso is, that if the warrantee does what he can according to circumstances, he shall not be injured on account of the war, nor thereby be delayed in the acquisition of his title.

The price of the lands, and the terms of purchase, were fixed upon the basis of peace. Twenty dollars per hundred acres, with the condition of settlement and residence was a full consideration in a time of peace. The legislature could not expect to get better terms in a time of war. As the *price* was to be the same in war and peace, the modification must be in the terms of the condition of settlement and residence.

If with the same price you exact similar conditions of settlement and residence at an indefinite distance of time, and after an intervening war, during the whole of which you require a constant persistance in endeavours to make such settlement, you, in effect, increase, you double or multiply the sum to be paid as the consideration of the land; and in addition to the original terms of price, settlement and residence, you gain the use of the money, and the co-operation of individuals in forming that barrier, which was one of the great objects of the act; the purchaser loses both the interest of his money and the use of his land. It is impossible, therefore, to require endeavours during, and accomplishment after the war, and that the purchaser does not pay a higher price for the land on account of the war.

It becomes important to consider whether the endeavours were to be persisted in during the war; for we have been lately told for the first time, that *persist*, means *desist* during the war, and after the war it again means *persist*.

It is admitted that a frontier of hardy inhabitants to oppose against the incursions of the savage enemy was a leading consideration with the legislature; it was natural for them to wish attempts to settle might be made during the war. It was acknowledged to be

HUDDLESTON'S LESSEE v. DOUGLASS.

unreasonable that the hazardous *experiment* should be made at the expense of the adventurers. The event was doubtful. Hopes of success were however entertained. The law contemplated the disposal of two millions of acres. What number of persons might be induced to share in its undertaking, was uncertain.

But the words of the act admit of no doubt that the *persisting* was to be in a time of war. If the grantee shall be prevented by the enemy, and shall persist in his endeavours—that is, in his endeavours to surmount the obstacle which prevented the settlement, namely, the force of arms of the enemies of the United States, then, &c.

2d. What is the period of time during which the endeavours were to be continued, in order to effect a release of the condition, and amount to a substitute for performance?

As two years from the date of the warrant was the time in which the settlement was to be made, if there had been no prevention, we say that perseverance in endeavours during the same period in a time of war, was all which the legislature required;

Because, without the proviso, the estate of the grantee would then have become absolute at common law, and the proviso, being for the benefit of the grantee, shall not place him in a worse situation than if it had not been inserted.

Because, to adopt the principle which is urged against us, that we ought to commence in a reasonable time after the removal of the force, is worse than forfeiture, as it introduces infinite confusion and endless controversy.

Because, taking possession, clearing, fencing, cultivating and building, are no where in the law required of the warrantee after two years from the date of the warrant, and persistance must relate to the act of taking and maintaining possession.

Because, the law does not provide for cases of interruption by war for more than two years; and to require longer efforts would be lengthening the persistance to the end of the war, and five years afterwards; which would be inconsistent with the last clause of the proviso, giving absolute estates after certain persistance had failed. And,

Because, if the persistance had been construed to be indefinite, no man of any prudence among ourselves, and no foreigner or individual, would have advanced a dollar on those lands.

No man could, on that idea, conjecture when he might get a title; the war might continue ten years; the country might be restored to the Indians for a stipulated time; or settlements might have been prohibited by the United States; and in all these events the purchaser would have lost his money and labour.

The legislature departed from the common law, in requiring a persistance during the war. For what purpose? To carry a favourite point. An establishment of settlers from *Presqu' isle* to the *Ohio*. What do they promise for this extra requisition? An absolute title, if the exertions for two years should be ineffectual.

But he is to "persist in his endeavours to make such actual settlement *as aforesaid*;" that is, within two years from the date of the warrant. No other kind of settlement, and no other time is prescribed. But he could not persist to make such actual settlement within two years from the date of the warrant, after those two years had expired; and a settlement made after the two years could not have availed.

3d. If the persistance must be for more than two years, when will it end? Where is the term at which the legislature has said the estate shall become absolute? If the grantee get possession at the end of the five years, must he go still further and reside five years? There can be no pretence for persisting five years, because, without a settlement made, there is no epoch from which the five years are to begin to run; and there can be no settlement made but within two years from the date of the warrant.

HUIDEKOPER'S LESSEE v. DOUGLASS.

If no settlement within the two years, no question can ever arise respecting the five years.

4th. If the proviso has any meaning different from the common law, respecting force of arms of a public enemy, it certainly means to impose a new duty upon the grantee, and to give him an equivalent.

What was the new duty? Persistance for two years, whether the country was at peace or war.

What was the equivalent? Substitution of ineffectual, though sincere persistance in endeavours for actual settlement.

What was the motive for this departure from the common law? A sanguine hope of removing the enemy to a great distance from our old settlements, by blocking up the pass through which they so easily entered.

With this construction of the act, every proceeding of the state, and of the grantees, will perfectly harmonize.

But if the meaning be doubtful, and resort should be had to the common law, such a construction would be made, as might confirm the estate, and quiet a *bona fide* purchaser; and no construction could possibly be adopted which would repeal such an express stipulation in favour of the grantee, as is contained in the last clause of the proviso.

5th. If a forfeiture has incurred, or if the title has reverted to the state, by the default of the grantee, by whom can advantage be taken? By individuals or by the state, and in what method?

We contend by the *state only*. And we rely upon general principles—on the reason and convenience of the thing—on the express provisions of the legislature, and on the decisions of the state judges, without a dissentient voice, or the expression of a doubt.

If any individual may enter upon the tenant of the Holland Company whenever he shall choose to say that

the settlement is not completed in due time, they may be dispossessed of every foot of land they have taken up. Numbers and strength are against them.

It is a general principle of law, that the commonwealth can only take by inquest of office, of entitling, or of instruction. The title of the sovereign must appear on record.

This rule is founded in good sense and propriety, and is inforced, in this instance, by a further rule, that whoever comes into possession with title, or by law, shall not be dispossessed without process.

If uninformed individuals, under the influence of bias and passion, are to decide the question of forfeiture, and to enter on the lands at their discretion, stay as long as they please before they apply for a warrant, and so in succession, upon the idea either of forfeiture or failure in persistance in endeavours to settle, innumerable mischiefs and endless confusion will indeed ensue.

The legislature foresaw the great inconveniences that would result from constituting every needy adventurer a judge of their meaning in this law, and have, therefore, marked out the mode in which advantage shall be taken of a default in the grantee, by providing, that in default of actual settlement and residence the commonwealth may grant new warrants to other actual settlers. The commonwealth, therefore, is to be satisfied in the first place that the default has been made, and in the second place, that the applicant is such an actual settler as may purchase, and in the third place, a warrant must issue to the applicant before he can have any right to enter.

By the terms *other actual settlers*, the legislature meant persons who were willing to come under engagements to settle; persons who will purchase the land subject to the condition of settlement; or, in the language of the second section of the act, "who *will* cultivate, improve, and settle the same," not who *have* cultivated, improved and settled; or in the language of the 3d section, "who are *desirous* to settle and *improve*."

HUIDEKOPER'S LESSEE v. DOUGLASS.

Lewis, on the same side.

The proviso does not relate to the residence. A settlement may be made and not continued. If a man has completed his settlement, and is driven off by the enemy before he has finished the five years' residence, we say the residence is dispensed with; for he is only to persist in endeavours to make the settlement; and if the settlement is already made, he cannot be required to persist in his endeavours to make it. That part of the proviso, therefore, relative to persistance, does not apply to him who has finished his settlement. The proviso as to him will read thus, that if such actual settler shall be driven from his settlement, he shall be entitled to hold in the same manner as if the settlement had been continued. Our construction, therefore, does not involve the consequence which gentlemen have supposed.

There is a passage of the act which has not been noticed, and which strongly implies that residence is not included in settlement. It is this: "And that in default of such actual *settlement* and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other *actual settlers* for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, *and so as often as defaults shall be made.*" If settlement includes the five years' residence, then an actual settler is a person who has made an actual settlement by clearing, fencing, cultivating, building and residing five years on the land. If on default the commonwealth is to grant the land to such an actual settler only, there never can be but *one* default, because the second warrantee will have complied with all the requisites for a full and absolute title before the warrant is granted. The words, *and so as often as defaults shall be made*, would, in such case, be nugatory and nonsensical.

No argument can be drawn from the 15th section; for it does not follow that because one section requires a particular construction different words, relative to a different subject in another section, must have a similar construction. It only shows, what we all agree is the fact, that the act is very inaccurately drawn, and cannot be understood according to its strict letter.

Wednesday, February 27.

MARSHALL, Ch. J. delivered the opinion of the court as follows:

The questions which occurred in this case, in the circuit court of Pennsylvania, and on which the opinion of this court is required, grow out of the act passed by the legislature of that state, entitled "an act for the sale of the vacant lands within this commonwealth."

The 9th section of that act, on which the case principally depends, is in these words, "and be it further enacted," &c.

The questions to be considered, relate particularly to the proviso of this section; but to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described therein, shall vest in him.

Two classes of purchasers are contemplated.

The one has already performed every condition of the sale, and is about to pay the consideration money; the other pays the consideration money in the first instance, and is afterwards to perform the conditions. They are both described in the same sentence, and from each, an actual settlement is required as indispensable to the completion of the title.

In describing this actual settlement, it is declared that it shall be made, in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing, and cultivating, at least, two acres for every hundred acres contained in one survey, erecting thereon, a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years next following his first settling of the same, if he or she shall so long live."

HUIDEKOPER'S LESSEE v. DOUGLASS.

The manifest impossibility of completing a residence of five years, within the space of two years, would lead to an opinion, that the part of the description relative to residence, applied to those only who had performed the condition before the payment of the purchase money; and not to those who were to perform it afterwards. But there are subsequent parts of the act which will not admit of this construction, and, consequently, residence is a condition required from the person who settles under a warrant, as well as from one who entitles himself to a warrant by his settlement.

The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of, "*and residing, or causing a family to reside there,*" *and shall reside*, &c. The effect of this correction of language, will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that in the view of the legislature, the settlement and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words, "such actual settlement and residence," which prove, that residence is required from the warrantee, prove also, that settlement and residence are, in contemplation of the law, distinct operations. In the nature of things, and from the usual import of words, they are also distinct. To make a

settlement, no more requires a residence of five, than a residence of five hundred years: and of consequence, it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms settlement and residence being understood, the court will proceed to consider *the proviso.*

That part of the act treats of an actual settler, (under which term is intended, as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee who had made an actual settlement in performance of the conditions annexed to his purchase) and of "any grantee in any such original or succeeding warrant;" who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced, are brought together in the same sentence, and terms are used appropriate to the situation of each, but not applicable to both. Thus, the idea of "an actual settler," "prevented from making an actual settlement," and after "being driven therefrom," "persisting in his endeavours," to make it, would be absurd. To apply to each class of purchasers, all parts of the proviso would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is to apply the provisions distributively to the description of persons to whom they are adapted, *reddendo singula singulis.* The proviso then would read thus, "Provided always, nevertheless, that if any such actual settler shall be driven from his settlement, by force of arms of the enemies of the United States; or any grantee. in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, and shall persist in his endeavours, to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the

same manner, as if the actual settlement had been made and continued."

The two cases are, the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavours to make one.

It is perfectly clear, that in each case, the proviso substitutes something for the settlement to be made, within two years, from the date of the warrant, and for the residence to continue five years from the commencement of the settlement, both of which were required in the enacting clause.

What is that something?

The proviso answers, that in the case of an "actual settler," it is his being "driven from his settlement by force of arms of the enemies of the United States," and in case of his being a grantee of a warrant not having settled, it is "persisting in his endeavours to make such actual settlement." In neither case, is residence or persisting in his endeavours, at residence required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement; for in the same sentence, they say, that the person who comes within the proviso, shall hold the land "as if the actual settlement had been made and continued."

It is contended on the part of the defendant, that as the time during which persistance shall continue, is not prescribed, the person claiming the land must persist until he shall have effected both his settlement and residence, as required by the enacting clause of the act. That is, that the proviso dispenses with the time, and only with the time, during which the condition is to be performed.

But the words are not only inapt for the expression of such an intent; they absolutely contradict it.

If the proviso be read, so as to be intelligible, it requires nothing from the actual settler, who has been driven from his settlement. He is not to persist in his endeavours at residence, or, in other words, to continue his settlement, but is to hold the land. From the warrantee who has been prevented from making a settlement, no endeavours at *residence* are required. He is to "persist in his endeavours," not to make, *and to continue* such actual settlement, but "to make *such actual settlement as aforesaid.*" And if he does persist in those endeavours, he is to hold the land, "as if the actual settlement had been made *and continued.*" The construction of the defendant would make the legislature say, in substance, that if the warrantee shall persist in endeavouring to accomplish a particular object, until he does accomplish it, he should hold the land as if he had accomplished it. But independent of the improbability, that the intention to dispense, only with the time in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used, which seem to restrict the time during which a persistance in endeavours is required. The warrantee is to persist in his endeavours, "to make such actual settlement as aforesaid." Now, "such actual settlement as afosesaid," is an actual settlement within two years from the date of the warrant. As it could only be made within two years, a persistance in endeavouring to make it, could only continue for that time.

If, after being prevented from making an actual settlement, and persisting in endeavours, those endeavours should be successful within the two years after which the person should be driven off, it is asked, what would be his situation?

The answer is a plain one. By persisting, he has become an actual settler; and the part of the proviso which applies to actual settlers, protects him.

If, after the two years, he should be driven off, he is still protected. The application of external violence dispenses with residence. The court feels itself bound

to say so, because the proviso contains a substitute, which, in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause; and of that substitute, residence forms no part.

In a great variety of forms, and with great strength, it has been argued, that the settlement of the country was the great object of the act; and that the construction of the plaintiff would defeat that object.

That the exclusive object of an act to *give* lands to settlers, would be the settlement of a country, will be admitted; but that an act to *sell* lands to settlers, must have for its exclusive object, the settlement of the country, cannot be so readily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far those two objects might be consulted, or how far the one yielded to the other, is only to be inferred from the words in which the legislative intention has been expressed. How far the legislature may have supposed the peopling of the district in question, to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shown by their own language. At any rate, if the legislature has used words, dispensing with residence, it is not for the court to say they could not intend it, unless there were concomitant expressions, which should explain those words in a manner different from their ordinary import. There are other considerations in favour of the construction, to which the court is inclined.

This is a contract; and although a state is a party, it ought to be construed according to those well established principles, which regulate contracts generally.

The state is in the situation of a person who holds forth to the world, the conditions on which he is willing to sell his property.

If he should couch his propositions in such ambiguous terms, that they might be understood differently, in consequence of which, sales were to be made, and the purchase money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity, and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

It being understood, that the opinion of the court on the two first questions, has rendered a decision of the third unnecessary, no determination respecting it has been made.

It is directed, that the following opinion be certified to the circuit court.

Certificate of the Opinion.

1st. That it is the opinion of this court, that under the act of the legislature of Pennsylvania, passed the 3d day of April, A. D. 1792, entitled "An act for the sale of the vacant lands within this commonwealth," the grantee, by a warrant of a tract of land lying north and west of the rivers Ohio and Alleghany and Conewango creek, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the 10th of April, 1793, the date of the said warrant, until the 1st of January, 1796; but who, during the said period, persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 9th section of the said law prescribes to vest a title in the said grantee.

2d. That it is the opinion of this court, that a warrant for a tract of land lying north and west of the rivers Ohio and Alleghany and Conewango creek, granted in the year 1793, under and by virtue of an act of the legislature of Pennsylvania, entitled "An act for selling the vacant lands of this commonwealth," to a person, who, by force of arms of the enemies of the United States, was

HUIDEKOPER'S LESSEE v. DOUGLASS.

prevented from settling and improving the said land, and from residing thereon from the date of the said warrant until the 1st of January, 1796, but who, during the said period, persisted in his endeavours to make such settlement and residence, vests in such grantee a fee simple in the said land, although, after the said prevention ceased, he did not commence, and within the space of two years thereafter, clear, fence and cultivate, at least two acres for every hundred acres contained in his survey for the said land, and erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling of the same; the said grantee being yet in full life.

JOHNSON, J. I concur in the decision given by the court in this case; but there was a question suggested and commented on in the argument which has not been noticed by the court, but which appears to me to merit some consideration.

It was inquired by the counsel for the defendant, should the court adopt the principle, that persistance for two years is to be substituted for an actual settlement and residence, what is to be the effect of a partial prevention? Is the warrantee to be subjected to the necessity of making good his settlement, should the prevention cease or commence at any point of time during the two years without any, or under what limitation?

It is undoubtedly true, that any construction of a statute which will produce absurdities, or consequences in direct violation of its own provisions, is to be avoided. It were better not to depart from their literal signification than to involve consequences so inconsistent with the nature and very idea of legislation. But it does not appear to me that any embarrassment will attend the construction of this act which the court has adopted; that the case of a partial duration of the existence of the preventing cause is not within the view of the proviso; that it is not excepted from the operation of the enacting clause. It would be absurd to impose upon the warrantee the necessity of performing in a few months, perhaps at the most inconvenient season of the year, a condition for which the act proposes to hold out to him an indulgence

of two years; when prevented too by a cause not within his controul, and against which the state was bound to protect him. If such were the case now before the court, I should be of opinion that we must resort to general principles for a decision. With regard to the performance of conditions, it is a well known rule, that obstructions interposed by the act of God, or a public enemy, shall excuse from performance, so far as the effect of such preventing cause necessarily extends.

In cases of partial prevention, I should therefore be of opinion, that it would be incumbent upon the warrantee to satisfy the court that he had complied with the conditions imposed by the act, so far as he was not necessarily prevented by the public enemy.

It may appear singular that a deficiency, of a single day perhaps, should produce so material an alteration in the rights or situation of the warrantee. But the legislature of Pennsylvania were fully competent to make what statutory provisions they thought proper upon the subject; and the court is no further responsible for the effect of the words which they have used to express their intent, than to endeavour to give a sensible and consistent operation to them in every case that can occur.

THE UNITED STATES v. HOOE, ET AL.*

Saturday, February 23.

The United States have no *lien* on the real estate of their debtor until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has

ERROR to the circuit court of the district of Columbia.

Mason, attorney of the United States for that district, on the 17th of August, 1801, filed a bill in equity against *Robert T. Hooe*, *W. Herbert*, *John C. Herbert*, and the *executors*, *widow and heirs of Col. John Fitzgerald*, late collector of the customs for the port of Alexandria, and obtained an injunction to prevent the sale of certain real

* Present, *Marshall*, Chief Justice.—*Cushing*, *Paterson*, *Washington* and *Johnson*, Justices.

THE UNITED STATES v. HOOE AND OTHERS.

estate in Alexandria, advertised for sale by W. and J. C. Herbert, under a deed of trust made by Fitzgerald for the indemnification of Hooe.

The material facts appearing upon the record are, that Fitzgerald, upon being appointed collector, executed a bond to the United States, on the 10th of April, 1794, with Hooe as surety, in the penalty of 10,000 dollars, for the faithful performance of the duties of his office. In April, 1798, he was found to be greatly in arrears, and upon a final adjustment of his accounts, on the 15th of August, 1799, the balance against him was 57,157 dollars. On the 16th of January, 1799, Hooe having knowledge that Fitzgerald was largely indebted to the United States, but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the bank of Alexandria to meet the drafts of the treasury of the United States, and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety for Fitzgerald, in the bond to the United States, and Fitzgerald proposing, when he should wish to obtain a loan of money from the bank of Alexandria, to draw notes to be indorsed by Hooe, whereby the latter might be liable and compelled to pay the same, and the former being desirous of securing and indemnifying Hooe from all damages, costs and charges which he might at any time thereafter be subject and liable to by reason of any misconduct of Fitzgerald in the discharge of his duty as collector, or for or on account of any notes drawn by him for his particular use and accommodation, and indorsed by Hooe, and negotiated at the bank of Alexandria. The indenture then witnessed, that for those purposes, and in consideration of the trusts and confidences therein after expressed, &c. and of one dollar, &c. Fitzgerald bargained and sold, &c. to the trustees, W. and J. C. Herbert, the real estate therein described, to have and to hold the same to them and the survivor of them, &c. "*in trust*, to and for the uses and purposes herein after mentioned, and to and for no other use and purpose whatsoever; that is to say, in case he the said John Fitzgerald shall neglect any part of his duty as collector of the said port of Alexandria," &c. "or in case any note or notes so drawn, indorsed and negotiated at the bank of Alexandria, for the particular use

made a voluntary assignment of all his property; or the debtor having absconded, concealed, or absented himself, his property has been attached by process of law.

A mortgage of part of his property made by a collector of the revenue to his surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgagor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the mortgagee knew at the time of taking the mortgage

and accommodation of him, the said John Fitzgerald, shall not be taken up and discharged by him when the same shall become payable; that in either case, as soon as any demand shall be made upon him, the said R. T. Hooe," &c. "for the payment of any sum or sums of money which ought to be paid by the said John Fitzgerald," &c. then the trustees should, upon notice given them by Hooe, of such demand, proceed to sell the property for ready money, and after paying the expenses of sale, should pay and satisfy the sum or sums of money so demanded of Hooe, either as security for Fitzgerald's due and faithful execution of the office of collector of the said port of Alexandria, or as indorsor of any note or notes so drawn by Fitzgerald, "and negotiated at the bank of Alexandria for the particular accommodation of the said John Fitzgerald;" and lastly, to pay over to him the surplus. And in further trust that if Fitzgerald should duly keep Hooe indemnified, &c. and should duly pay the several notes which should be so drawn by him and indorsed by Hooe, and negotiated at the said bank, "for the particular accommodation of him, the said John Fitzgerald, as the same shall become payable," then the trustees should reconvey, &c.

that the mortgagor was largely indebted to the United States. Costs are not to be awarded against the United States.

Hooe had indorsed Fitzgerald's notes at the bank to a large amount, and at the time of his death there were unpaid two notes of 1000 dollars each, and one of 1800 dollars, one of which for 1000 dollars, together with interest upon the whole, amounting to 288 dollars and 94 cents, was afterwards paid by Mr. Keith, one of the executors, in order to prevent a sale of the property under the trust. There was also evidence tending to show that the money borrowed from the bank upon Hooe's indorsement, was applied in discharge of warrants drawn by the treasury upon Fitzgerald.

Fitzgerald died in December, 1799, having by his will directed his real estate to be sold for the payment of his debts. There was no positive evidence of his insolvency.

The bill charged that he died insolvent, and that the United States had a right, in preference to all others, to apply his property to the discharge of the debt, and if there should be a deficiency, to resort to the surety for the balance, as far as the penalty of the bond would jus-

THE UNITED STATES v. HOOE AND OTHERS.

tify; and that the deed of trust was fraudulent as to the United States.

On the 1st of May, 1802, the injunction was dissolved by consent, and an interlocutory decree entered, ordering the trustees to pay the proceeds of the sale into court, subject to future order, touching the contending claims of the United States and Hooe.

At November term, 1802, the court passed the following *decree:*

"The objects of the bill filed in this cause were to set aside a deed executed on the 16th of January, 1799, by John Fitzgerald to William Herbert and John Carlyle Herbert, conveying certain property therein mentioned, in trust, for the purpose of indemnifying Robert Townsend Hooe as indorsor of certain notes negotiable in the bank of Alexandria, and as surety of John Fitzgerald in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to compel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him; and further to restrain and enjoin the said trustees from making sale of the said real property."

An injunction for the said purpose was granted by one of the judges of this court, in vacation; and afterwards, viz. at April term, 1802, after the appearance of the defendants, who were of full age, an agreement was made, and entered on the records and proceedings of this court, to the following effect, viz. that so much of the former order of this court, as restrained the defendants, W. Herbert and John C. Herbert, from selling the property in the deed of trust, in the bill mentioned, be discharged; and it was further *decreed and ordered*, that the said trustees should pay the proceeds arising from the sale of the said property, or of any part thereof, into this court, subject to the future order of the court, touching the contending claims of the United States, and of R. T. Hooe, one of the defendants to the said bill; *and now, at November term*, 1802, the said cause came

on by consent of parties, and by order of the court, on the bill, and on the answers of the defendants, (those of the infants being taken by their guardians, appointed for that purpose) and on the exhibits in the said bill and answers referred to, and on those afterwards admitted, and the arguments of counsel being heard in the said cause, and the same being by the court fully considered; *it is the opinion of the court*, that the deed of trust, in the said bill mentioned, was made *bona fide*, and for a valuable consideration, and was fairly executed by the said John Fitzgerald, to indemnify, and save harmless, the said R. T. Hooe, from all loss and damage, by reason of his indorsement of several notes, negotiated at the bank of Alexandria, amounting to the sum of 3,800 dollars, to enable the said John Fitzgerald to pay that sum to the United States; which appears to have been paid accordingly; and also, to indemnify and save harmless, the said R. T. Hooe, against all loss and damage, by reason of his having become bound in a bond, in the penalty of 10,000 dollars, payable to the United States, as security for the said John Fitzgerald's faithful performance and due discharge of the office of collector of the customs, in the district of Alexandria. That there does not appear to have been any fraud in the said parties, or either of them, and that the said deed is not invalidated by any law of the United States.

It is thereupon, by this court *decreed and ordered*, that the bill in this cause, as to all the defendants, except R. T. Hooe, W. Herbert, and J. C. Herbert, be retained for t · further order and decree of this court, and that as to the said defendants, R. T. Hooe, W. Herbert, and J. C. Herbert, the said bill be dismissed *with costs* to the said defendants. And as to the money which has arisen from the sale of the said real property, the net amount of which is 14,318 dollars and 66 cents, after deducting the charges of the sale, and which has been, by the order of this court, deposited by the clerk thereof, in the bank of Alexandria; this court doth *decree and order*, that the said clerk do pay the sum of 4,318 dollars and 66 cents, part thereof, to the said trustees, W. Herbert and J. C. Herbert, to be by them applied to the dis-

THE UNITED STATES v. HOOE AND OTHERS.

charge of the sum of 3,127 dollars, due upon certain notes negotiated in the bank of Alexandria, on which the said R. T. Hooe was an indorsor for the said John Fitzgerald; and also to the repayment to the executors of the said John Fitzgerald, of the sum of 1,185 dollars, advanced and paid by them to the bank of Alexandria, for, and on behalf of the said R. T. Hooe, in part payment of the notes negotiated in the said bank, for the said John Fitzgerald, and indorsed by the said R. T. Hooe, which, it was intended, the said R. T. Hooe should be indemnified against, by the said deed; and the residue, if any there should be, of the said sum of 4,318 dollars and 66 cents, to be paid by the said clerk into the treasury of the United States, in discharge of so much of the balance due from the estate of the said John Fitzgerald; and that as to the residue of the proceeds of the said sale, being the sum of 10,000 dollars, the said clerk do pay the same into the treasury of the United States, expressly in discharge of the said sum of 10,000 dollars, for which the said R. T. Hooe is bound in the bond, which, in the said bill and answers is referred to, and to go also in discharge of so much of the claim of the United States against the said John Fitzgerald, and the same is *decreed and ordered accordingly*.

To reverse this decree, a writ of error issued returnable to February term, 1803, which was dismissed for want of a statement of the facts upon which the decree was founded.*

The November term, 1802, of the circuit court, at which the original decree was entered, being continued by adjournment, to April, 1803. Mason, after the dismission of the writ of error, moved the court below, to make a statement of the facts upon which the decree was founded, to be sent up with a new writ of error; and urged, that as it was, in comtemplation of law, the same term in which the decree was made, it was competent for the court to open it for that purpose. But the court, being of opinion, that by the writ of error the record was completely re-

* *See Ante*, *vol.* 1. *p.* 318.

moved, and the decree thereby made absolute, refused to make the statement.

A new writ of error was sued out by the United States, returnable to February term, 1804; upon the return of which,

Swann, for defendants in error,

Contended, that the late act of congress, of 3*d March*, 1803, *vol.* 6, *p.* 315, *c.* 93, § 2, did not apply to this case, because it was passed after the final decree rendered; and that the court was still precluded from looking into *this* case, and correcting the errors in the decree, if any such existed, without a statement of the facts upon which the decree was founded; but,

By the court. The words of the act are, "that from all final judgments or decrees, *rendered*, or to be rendered, in any circuit court," "in any cases of equity," &c. "an appeal shall be allowed," "subject to the same rules, regulations and restrictions, as are prescribed in case of writ of error."

A perfect analogy exists between the cases of appeals and of writs of error, as to the time in which they may be granted, and the judge, who can grant the one, may allow the other. The act of congress comprehends past cases as well as future.

The cause was continued for argument, and at this term, was argued by *Mason*, for the United States, and by *C. Lee* and *Swann*, for the defendants in error.

Mason, after observing that the evidence did not support the allegation, that the money borrowed of the bank, upon Hooe's indorsements, was applied to the use of the United States, contended,

1. That the deed was fraudulent, as to all the world, because it empowered Fitzgerald to borrow money

THE UNITED STATES v. HOOE AND OTHERS.

upon it for his own use, while it protected the property from his creditors.

2. That Hooe has no preference to the United States; and even if the deed was not fraudulent, as to all the world, yet Hooe stands in such a situation, that he must be postponed to the United States and all other creditors.

1. Hooe admits, that he had notice of Fitzgerald's default, to at least the amount of 30,000 dollars, but the exact amount is unimportant. And although, in his answer, he gives an opinion as to the value of Fitzgerald's estate, at the date of the deed, yet he admits, that such as it then was, it now is, excepting any depreciation which it may have suffered.

The deed, inasmuch as it contains a power to raise money upon it, in future, for his own use, is a deed in trust for himself, and therefore fraudulent upon general principles of law. His power to borrow money upon it, is unlimited by any thing but the value of the property and the good will of Hooe; and the money thus raised upon it might have been applied exclusively to his own use.

The words of the statute of 13 *Eliz. c.* 5, which have, in substance, been inserted into the Virginia code of laws, are large enough to take in this case; and the cases decided under it clearly apply to the present deed. Indeed, that part of the statute which makes such deeds void as to creditors, is no more than a declaration of the pre-existing rule of the common law. 2 *Bac. Ab. Tit. Fraud.* 2 *Com. Dig. Tit. Covin.*

The 5th sign of fraud mentioned in *Twyne's case*, 3 *Co.* 81. (*b*) is, that there "was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud." And it is unimportant whether the trust be expressed or implied. Every gift made on a trust is out of the proviso of the act. Here it was part of

the trust that Fitzgerald should raise money upon the deed to his own use; and a deed which covers the property from his creditors, and gives the grantor the whole benefit and use of it, is the very kind of deed which the statute meant to avoid. If, then, the deed is void as to creditors, Fitzgerald is dead, and the United States must be preferred in payment.

2. Hooe cannot be preferred to the United States, in consequence of this deed, even supposing it not to be fraudulent under the statute of *Elizabeth*, but must be postponed to the United States, and all other creditors.

This case stands on the same ground as a bond given for duties, in which case it is enacted by the *act of* 4th *of August*, 1790, *c.* 35, § 45, *vol.* 1, *p.* 221, that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied." The insolvency here mentioned, means an inability to pay all his debts, and is so expounded by the act of 2d *of May*, 1792, *c.* 27, § 18, *vol.* 2, *p.* 79, in which it is "declared that the cases of insolvency in the said 44th" (45th) "section mentioned, shall be deemed to extend as well to cases in which a debtor, *not having sufficient property to pay all his or her debts*, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

A voluntary assignment, for the benefit of his creditors, made by a debtor, unable to pay all his debts, is one of the cases in which the United States are to have a preference. The word "voluntary" does not mean *without consideration*, but without compulsion of law, as in cases under a bankrupt law. A deed made to secure a just debt may, in this sense of the word, be a voluntary deed of assignment. The instant a man

THE UNITED STATES v. HOOE AND OTHERS.

makes such a voluntary assignment, the preference of the United States attaches, if, upon subsequent inquiry, it shall appear that he is unable to pay all his debts. The act of 2d *of March*, 1799, *c.* 128, § 65, *vol.* 4, *p.* 387, has the same words, explanatory of the term *insolvency*, with those of the 18th § *of the act*, 1792, *vol.* 2, *p.* 79. The legislature did not mean to confine it to cases of insolvency, under a bankrupt or insolvent law of any of the states, or of the United States, nor to voluntary conveyances of *all* the property of a debtor, for the benefit of his creditors.

In the present case, all the property remains in the same state in which it was at the time of the deed, and it is not contended that it is sufficient to pay all the debts; for if it is, Hooe can receive no injury; but if it is insufficient, then he can derive no benefit, until the United States are first satisfied.

We do not contend that the United States had a *lien* upon the property. That is a distinct question, and has been decided by this court, at the present term, in the case of *United States* v. *Fisher, et al.*

But it is right that the interest of all should prevail over that of an individual.

We admit that Fitzgerald had the right to sell and alien the property, but it does not follow that he could, by a mortgage, or an assignment, prefer a *particular* creditor to the United States.

The object of the legislature was, that if a man is unable to pay all his debts, and attempts to give a particular preference, his hand shall be stopped, until the debt due to the United States shall be satisfied. If it turns out that he was actually insolvent, the United States, and not the individual creditor, shall have the preference.

The object of the deed is, that if Fitzgerald's estate should be insufficient to pay all his debts, Hooe shall be preferred.

But the act of congress says that, in that event, the United States shall be preferred. The deed and the act are inconsistent with each other, and the deed must yield to the act.

Among individual creditors, he had a right to prefer one over another, and such deeds would have been effectual, saving the priority of the United States.

This question is the same as if it had arisen upon a bond given for duties; for by the *act of* 3d *of March*, 1797, *c.* 74, § 5, *vol.* 3, *p.* 421, it is enacted, "that where any revenue-officer, *or other person*, hereafter becoming indebted to the United States, by bond *or otherwise*, shall become insolvent," &c. "the debt due to the United States shall be first satisfied; and the priority hereby established, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof," &c. "as to cases in which an act of legal bankruptcy shall be committed."

This is a voluntary assignment, and Fitzgerald died insolvent. It is not necessary that he should have been so at the time of executing the deed. If he become so afterwards, and before the trust is executed, it is sufficient. It is the intention of the law, if there is an actual insolvency, that all priorities should yield to that of the United States.

The United States, therefore, has a right to the whole of Fitzgerald's estate, in the first place; and if that is insufficient to pay the debt, they may resort to Hooe, for the whole penalty of the bond, if necessary.

C. Lee and *Swann*, contra, contended,

1st. That the deed was made *bona fide*, and for a valuable and good consideration, and therefore valid upon general principles, both of law and equity.

2d. That it was not invalidated by any statute of the United States.

THE UNITED STATES v. HOOE AND OTHERS.

1. *Indemnity* is a good consideration, within the statute of *Elizabeth*, 1 *Burr.* 474, *Worseley* v. *Demattos*, to the whole of which case the attention of the court is requested, because, in almost every part, it is applicable to the present.

The deed was also *bona fide*. There is no evidence that Hooe knew of Fitzgerald's inability to pay his debts at the date of the deed. Indeed, there is no positive evidence of the insolvency of the estate, even at this moment. It has none of the marks of fraud mentioned in Twyne's case. *First;* it is only for a *part*, perhaps not a third part of his estate. *Secondly;* although Fitzgerald remained in possession, yet, it being real estate, possession was no mark of fraud, and could not deceive and defraud others, because the deed must of necessity be upon record. *Thirdly;* it was not made secretly. *Fourthly;* it was not made pending any process against Fitzgerald. *Fifthly;* here was no secret trust for the benefit of the grantor—and, *Sixthly;* it contains no unusual clauses in support of its honest and fair intentions, which, Lord Coke says, always induce suspicion.

The whole evidence in the case shows, that the only intention of the parties was that which is expressed fully and fairly in the deed. He had a right to indemnify Hooe at the time of giving the bond, and it can make no difference whether he executed the deed at that time or afterwards; the consideration was equally good at one time as at the other. It could be no fraud in Hooe to wait for security as long as he thought himself safe; and it could be no fraud in Fitzgerald to give a security, which he was bound in honour and conscience to give, whenever it should be demanded.

Mason, in answer to a question from the Chief Justice, whether there was any act of Congress which subjected the lands of the debtors of the United States to a specific lien, said, he knew of none, unless it was the act of 11*th July*, 1798, *c.* 88, § 15, *vol.* 4, *p.* 197. But in the present case, Fitzgerald, by his will, charged his lands with the payment of his debts; and if he had not, they would have been liable to an *elegit*.

Chief Justice. I have considered the act of 1798; it only creates a *lien* when a suit is commenced.

Monday, February 25.

MARSHALL, Ch. J. I am directed by the court to inform the counsel in this case, that they do not wish to hear any argument from the counsel of the defendants in error, upon the general question of fraud, being satisfied on that point.

The court also wishes to draw the attention of the counsel to the question, whether there is any evidence of Fitzgerald's insolvency in the record.

Mason, for the United States.

The deed in this case is contingent; the power to the trustees to sell is contingent. They can only sell to *indemnify* Hooe. Until he is damnified they have no power to sell. The rents, issues, and profits, are to be taken by Fitzgerald only; and the legal estate being in the trustees, the property is protected from the *elegit* of the creditors. Suppose the property conveyed to be double the value of Hooe's claim, the residue would be protected from creditors, and would still be a fund from which Fitzgerald might draw supplies to himself.

But the *insolvency*, mentioned in the act of congress, means an inability to pay his debts, in contradistinction to an insolveney under a bankrupt law, or an insolvent act.

A *voluntary deed*, in the act, means a deed by a person unable to pay all his debts, made without coercion of law, to give a preference to some of his creditors. It is not necessary that it should be a conveyance of *all his effects*. Suppose he should make three separate deeds; one to one of his creditors for one third of his estate; a second to another creditor for another third of his estate, and a third deed to a third creditor for the residue. The two first deeds would not be less fraudulent than the third, because they conveyed only a part of the estate.

THE UNITED STATES v. HOOE AND OTHERS.

The decree of the court below is erroneous, because the answers and evidence specified the estate and effects of Fitzgerald, and the court ought to have ascertained the value, and from thence inferred his insolvency. An insolvency so ascertained, would have been such an insolvency as would have given the United States a preference.

As to the question, whether the insolvency appears upon the record—the bill charges the fact, and none of the answers or depositions denies it. A comparison of the balance due, with the effects and estate disclosed in the answers, affords the strongest corroboration; and even Hooe, in his answer, does not deny a knowledge of it. But whether he knew it or not, it is sufficient if we establish the existence of the fact; for in all cases "where any revenue officer," "indebted to the United States," "shall become insolvent," "the debt due to the United States shall be first paid."

C. Lee and *Swann*, contra.

The insolvency contemplated by congress, means a legal insolvency, not a mere incapacity to pay, unattested by some notorious act of failure, such as a voluntary assignment of *all the effects* for the benefit of creditors, or the closing of doors to prevent process being served, &c.

The cases provided for by the act, are,

1. If the debtor "shall become *insolvent*."

2. Where the estate of a deceased debtor "shall be insufficient to pay all the debts."

3. Where "a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment *thereof*."

4. Where "the estate and effects of an absconding, concealed, or absent debtor, shall be attached."

The 1st case is that of legal and public insolvency, where the estate and effects are assigned by law. If it

meant every case where a man was actually incapable of paying all his debts, it would frequently look back and undo all the negotiations of an extensive trade for many years; for it often happens that a merchant continues in business and credit long after his capacity to pay all his debts has ceased. Besides, it would have been unnecessary for the legislature to add expressly the case of a voluntary assignment, where there was an inability to pay all the debts, if such inability alone was within the meaning of the words "shall become *insolvent*."

2. The case of a deceased debtor, whose estate shall be insufficient to pay all the debts, would also have been included in the term *insolvent*, if it is to have so large and loose a construction as is contended for by the counsel for the United States.

3. And so would be the case of a voluntary assignment. But it is said that the present deed is such a voluntary assignment as is contemplated in the act.

The words of the act are, "a debtor, not having sufficient property to pay all his debts," that is to say, the *whole* of whose property shall be insufficient to pay all his debts, "shall make a voluntary assignment *thereof*," that is, of the *whole* of his property. The assignment contemplated in the law must, therefore, mean an assignment of the *whole*; but this is only an assignment of a part, certainly not so much as *half* of his property, and is, therefore, a complete answer as to that point.

4. The fourth case is of an attachment of the estate and effects of an absconding, concealed, or absent debtor, and does not absolutely require an insolvency, or even an inability to pay all the debts; but is a case of suspicion, in which a public act has been done and suffered, giving notice of the insolvency, if it really exists.

Even supposing, then, that Fitzgerald was actually unable to pay all his debts at the time of executing this deed of trust, (which fact, however, does not appear) yet, as his property was not divested by act of law, nor by such a voluntary assignment as is contemplated by the act of congress, the priority of the United States had not at-

THE UNITED STATES v. HOOE AND OTHERS.

tached, so as by any possibility to avoid the deed of trust.

This construction of the act of congress is warranted by the decision of a very respectable circuit court of the United States, in the case of *United States* v. *King*, *Wallace's Reports*, *p.* 13.

The United States are plaintiffs in equity for an injunction, and the burden is on them to prove all the material allegations of their bill. It is on them to prove the insolvency, not on us to disprove it.

If, then, the deed is not fraudulent in itself, nor made void by any act of congress, the judgment of the court below was correct, and ought to be affirmed.

Wednesday, February 27.

MARSHALL, Ch. J. delivered the opinion of the court.

The first point made in this case, by the attorney for the United States, is, that the deed of the 16th of January, 1799, is fraudulent as to creditors generally.

It is not alleged that the consideration was feigned, or that there was any secret trust between the parties. The transaction is admitted to have been, in truth, what it purports to be; but it is contended that the deed, on its face, is fraudulent as to creditors.

The deed is made to save Hooe harmless on account of his having become the security of Fitzgerald to the United States, and on account of notes to be indorsed by Hooe for the accommodation of Fitzgerald, in the bank of Alexandria.

These are purposes for which it is supposed this deed of trust could not lawfully have been executed; and the deed has been pronounced fraudulent under the statute of 13*th of Elizabeth.*

That statute contains a proviso, that it shall not extend to conveyances made upon *good consideration*, and *bona*

fide. The goodness of the consideration, in the case at bar, has been admitted; but it is alleged that the conveyance is not *bona fide;* and for this, *Twyne's* case has been principally relied on. But in that case, the intent was believed by the court to be fraudulent, and in this case it is admitted not to have been fraudulent. It is contended, that all the circumstances from which fraud was inferred in that case, are to be found in this; but the court can find between them no trait of similitude. In *that* case the deed was of *all* the property; was *secret;* was of *chattels*, and purported to be *absolute*, yet the vendor remained in possession of them, and exercised marks of ownership over them. In *this* case the deed is of *part* of the property, is of *record*, is of *lands*, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor. In the case of *Hamilton* v. *Russel*, this court declared an absolute bill of sale of a personal chattel, of which the vendor retained the possession, to be a fraud. But the difference is a marked one, between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chuses, or is compelled to exert his right. That the grantor is to receive the rents and profits, till the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant.

That the property stood bound for future advances, is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due. All the covenants in this deed appear to the court to be fair, legitimate, and consistent with common usage. It will barely be observed, that the validity of this conveyance is to be tested by the statutes of Virginia, which embrace this subject. But this is not mentioned as having any influence in this case.

THE UNITED STATES v. HOOE AND OTHERS.

The second point for which the plaintiffs contend is, that this is a case in which the priority of payment claimed by the United States in cases of insolvency, intervenes and avoids the deed.

This claim is opposed on two grounds. It is contended,

1st. That at the time of making this deed, Fitzgerald was not insolvent in point of fact; and,

2d, That this deed was not a transaction which evidences insolvency under the act of congress.

In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled, does not partake of the character of a *lien* on the property of public debtors. This distinction is always to be recollected.

In the case at bar, it will be observed, on the first objection made by the defendants, that the insolvency, which is the foundation of the claim, must certainly be proved by the United States. It must appear that at the time of making the conveyance, Fitzgerald was "a debtor not having sufficient property to pay all his debts." The abstract from the books of the treasury, is undoubtedly complete evidence as far as it goes; but it is not intended to show the state of Fitzgerald's accounts in January, 1799. If that had been its object, it would have credited him for the bonds then reported to be on hand. If the case turned entirely on this point, the court would probably send it back for further explanation respecting it. But this would be unnecessary, as it is the opinion of the court that the decree is right, however this fact may stand.

If a debtor of the United States, who makes a *bona fide* conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the nature of a *lien* from the instant he became indebted; the inconvenience of which, where the debtor continued to transact business with the world, would certainly be very great.

The words of the act extend the meaning of the word *insolvency*, to cases where "a debtor, not having *sufficient property to pay all his debts*, shall have made a voluntary assignment *thereof*, for the benefit of his or her creditors." The word "*property*" is unquestionably all the property which the debtor possesses; and the word "*thereof*" refers to the word "*property*" as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words "*or part thereof*," or others of similar import, would have been added.

If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a *bona fide* conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act.

It is observable, that the term *insolvency* was originally used, and the subsequent sentence is designed to explain the meaning and intent of the term. The whole explanation relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense.

It is the opinion of the court, that there is no error in the decree of the circuit court, and that it be affirmed.

After the opinion was given, it was stated, that the court below had decreed the United States to pay costs, and it was suggested that that circumstance might have escaped the notice of this court, in affirming the decree generally.

Mason observed, that costs were only given by statute, and that the United States are not bound by a statute, unless they are expressly named in it. That there was no means of compelling the United States to pay them.

MARSHALL, Ch. J. That would make no difference, because we are to presume they would pay them if bound by law so to do.

THE UNITED STATES v. HOOE AND OTHERS.

Mason. There is no precedent of a judgment against the United States for costs. In the case of the *United States* v. *La Vengeance*, 3 *Dal.* 301, the decree of the circuit court was affirmed *with costs*. But the next day the Chief Justice directed the words "with costs" to be struck out, as there appeared to have been some cause for the prosecution. But he observed, in doing this, the court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States, but left it entirely open for future discussion.

March 6th.

The court directed the decree of the court below to be affirmed, except as to costs, and reversed so much of the decree as awarded the United States to pay costs, and directed that no costs be allowed to either party in this court.

PEYTON *v.* BROOKE.

PEYTON v. BROOKE.

Wednesday, February 27.

In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both.

THIS case came before the court, upon a bill of exceptions to the opinion of the circuit court of the district of Columbia, for the county of Alexandria, upon a motion for execution on a *forthcoming* bond, had taken under the act of assembly of Virginia. *Revised Code*, *p.* 309.

The bond, upon which the motion was made, recites a *ca. sa.* against Peyton, in favour of Brooke, for 525 dollars, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight, and marshall's fees and commissions, and all costs, 19 dollars and 96 cents, amounting in the whole to 578 dollars and 82 cents.

The execution on which the bond was taken, was for 525 dollars, and 20 *dollars*, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight.

The whole amount of costs taxed on the original judgment was 20 dollars *and* 12 *cents*, and 602 pounds of tobacco, including the costs of issuing an execution.

The bond was taken upon an *alias ca. sa.* the first having been returned *non est.* The first execution was for 525 dollars, and 20 dollars *and* 12 *cents*, and 602 *pounds of tobacco.*

The execution upon which the bond was taken, included 22 pounds of tobacco, (the clerk's fees for issuing the *alias ca. sa.*) and did not include 12 cents, part of the costs taxed upon the original judgment.

The plaintiff, in the court below, released 44 pounds of tobacco, the costs of issuing both executions, and the court below gave judgment for the plaintiff. The defendant brought his writ of error.

The court called for statements of the case, agreeable to the rule of court.

Swann, for defendant in error, said he had supposed the rule to extend only to plaintiffs in error. The court said they expected them from both sides. No statements were prepared.

MARSHALL, Ch. J. We wish to give general notice to the gentlemen of the bar, that unless statements of the case are furnished according to the rule, the causes must either be dismissed or continued.

Jones, for plaintiff in error. There are two objections to the proceedings of the court below.

1st. That the *alias capias* and the bond include 22 pounds of tobacco for the clerk's fee, in issuing the *alias capias.*

2d. That the *alias capias* does not include 12 cents, taxed as part of the costs on the original judgment.

For this variance between the bond and the original judgment, the court below ought not to have awarded

PEYTON v. BROOKE.

execution upon the bond, but ought to have quashed both the bond and the execution upon which it was founded.

Every execution must pursue the judgment, or it is void.

The judgment having included all the costs, a ministerial officer cannot add any thing, unless warranted by statute.

No fee is given by statute for issuing an *alias capias*. The execution was therefore void, and no subsequent release of the fee by the plaintiff can make it good. The plaintiff, if he takes out an *alias ca. sa.* must do it at his own cost. The words of the act of assembly (*Revised Code, p.* 308, § 2.) are, "when any writ of execution shall issue, and the party, at whose suit the same is issued, shall afterwards desire to take out another writ of execution at his own proper costs and charges, the clerk may issue the same, if the first writ be not returned and executed."

MARSHALL, Ch. J. Does not that relate to an *alias* taken out before the return day of the first execution?

Jones. No *alias* execution can issue until after the return day of the first. If the first execution be returned not executed; or if it be executed and not returned, the plaintiff may have an *alias*, but it must be at his own expense.

MARSHALL, Ch. J. Would not an action at common law lie on the bond, even if the execution was quashed upon which the bond was founded?

C. Lee. If the bond was erroneous, the court would quash it as well as the execution. (*Simm* v. *Johnson, in the court of appeals of Virginia*, reported in *Washington's* or *Call's Reports.*)

MARSHALL, Ch. J. The plaintiff may quash the bond, and proceed on the original judgment; but the defendant can only quash the execution. A difference

was taken between a bond on a *ca. sa.* and a bond on a *fi. fa.* under the construction of the *statute of H.* 8, respecting sheriffs taking bonds *colore officii.* The case is reported. I was counsel and argued the case. I believe it was that of *Simm* v. *Johnson.*

Simms, for defendant in error. At common law, a creditor might have an *alias capias* if the first was returned *non est.* The statute provides, that he may also have an *alias* if the first be not returned executed. If the first be not returned, the *alias* must be at the plaintiff's costs; if it be returned, the *alias* is to be at the costs of the defendant.

In no case is judgment given for the costs of an execution. The clerk never taxes it until he issues the execution. The constant and uniform practice of the courts of Virginia, is to add the cost of the *alias*, if the first be returned and not executed.

But if the clerk had not a right to insert the cost of the *alias ca. sa.* that does not vitiate the bond. It is but the act of a ministerial officer, and the court have a right to correct it.

The sheriff is to take the bond for the amount mentioned in the execution. It is not right that the error of the clerk should deprive the plaintiff of his security; especially, as the bond is given for the benefit of the debtor, and the creditor has released the whole amount in dispute. It is no cause to quash the bond; nor to render it void at common law.

Swann, on the same side. The judgment is *for costs;* all the costs which have accrued or shall accrue. It is admitted that we have a right to recover the costs of the first execution; and even if the clerk has mistaken the law in adding the costs of the second, yet, that error is cured by the plaintiff's release. In the case of *Scott* v. *Hornsby*, 1 *Call*, 41, the court of appeals of Virginia, decided, that if a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment.

PEYTON v. BROOKE.

Jones, in reply. The awarding of execution on a forthcoming bond, upon motion, is a summary remedy given by statue, in derogation of the common law, and, therefore, the provisions of the statute must be strictly pursued. The release cannot aid an error in the exercise of this summary jurisdiction. I admit the practice to be, that if the bond be for more than the judgment, and the plaintiff releases the excess, it will support a judgment. So if the bond be for too small a sum, it is still good as a bond at common law. But in neither case will it support the summary proceeding by motion.

The taking a forthcoming bond, is one mode of executing the writ. If the defendant be arrested, the quashing of the execution releases his body. So, if goods be taken on a *fi. fa.* and the *fi. fa.* be quashed, the goods are discharged. So in this case, the bond, (being taken in lieu of the goods or of the body) would be discharged by the quashing of the execution.

It is true the judgment is for costs; but it cannot be in the alternative; that is, if one execution, then for 22 pounds of tobacco; and if two executions, then for 44 pounds of tobacco.

MARSHALL, Ch. J. The court is of opinion, that the act of assembly contemplates the case where the first execution is not returned nor executed; that is, where it is out and may be served.

The clerk was right in adding the costs of the *alias ca. sa.* The judgment is for *costs*, generally; which includes all the costs belonging to the suit, whether prior, or subsequent to the rendition of judgment. If new costs accrue, the judgment opens to receive them.

Judgment affirmed with costs.

LAMBERT'S LESSEE v. PAINE.

THIS was an ejectment brought in the circuit court of the United States, for the middle circuit in the Virginia district; in which John Doe, *a subject of the king of Great Britain*, residing without the state of Virginia, lessee of John Lambert, *another subject of the king of Great Britain*, complains of Richard Roe, *a citizen of Virginia, residing within the said state*, and claims possession of a messuage and tenement containing 156 acres of land in the county of Henry, being part of a tract of land called *Marrowbone*.

A devise of "all the *estate* called *Marrowbone*, in the county of Henry, containing by estimation 2,585 acres of land," carries the fee.

Quere, whether a British subject, born in England, in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia by descent, or by devise?

The jury found the following special verdict, viz. "That George Harmer, being seized in fee of the lands in the declaration mentioned, *on the 25th of June*, 1782, made a *paper-writing*, purporting to be his last will and testament, all written with his proper hand, and signed by him; which *will* we find in these words: "In the name of God, Amen. I George Harmer, of the commonwealth of Virginia, being perfectly well and of sound mind and memory, do make and ordain my last will and testament, in manner and form following, that is to say, all the estate, both real and personal, that I possess or am entitled to, in the commonwealth of Virginia, I hereby give and devise unto my friend, Thomas Mann Randolph, of Tuckaho, and Henry Tazewell, of the city of Williamsburgh, *in trust*, upon these conditions, that when John Harmer, my brother, now a subject of the king of Great Britain, shall be capable of acquiring property in this country, that they, or the survivor of them, do convey, or cause to be conveyed to him in fee simple, a good and indefeasible title in the said estate; and in case the said John Harmer should not be capable of acquiring such right before his death, then that my said trustees, or the survivor of them, do convey the said estate in manner aforesaid, to John Lambert, son of my sister, Hannah Lambert, when he shall be capable of acquiring property in this country; and in case John Lambert should not, before his death, be capable of acquiring a title to the said estate, then I direct the same to be con-

LAMBERT'S LESSEE v. PAINE.

veyed to my sister, Hannah Lambert, if she, in her lifetime, can acquire property in this country.

"But if the said John Harmer, John Lambert and Hannah Lambert, should all die before they can acquire property legally in this country, then I desire that my trustees aforesaid may cause the said estate of every kind to be sold, and the money arising from each sale, together with intermediate profits of the said estate shall be by them remitted to the mayor and corporation of the city of Bristol in England, to be by them distributed, according to the laws of England, to the right heirs of my said sister, Hannah Lambert, to whom I hereby give all such money, excepting the sum of 100*l.* lawful money to each of the aforementioned trustees, which shall be paid out of the first money arising from the sales aforementioned, or from the profits arising to my heirs. In witness whereof, I have hereunto set my hand and affixed my seal this 25th of June, 1782." *We find*, that on the 12*th day of September*, 1786, the said George Harmer, being seised as aforesaid, duly executed another writing testamentary, which we find in these words: "In the name of God, Amen. I George Harmer, being sick and weak in body, but in perfect mind and memory, do give and bequeath unto *Doctor George Gilmer*, of Albemarle county, *all the estate called Marrowbone*, in the county of Henry, containing, by estimation, 2,585 acres of land; *likewise*, *one other tract* of land in said county, called *Horse-pasture*, containing, by estimation, 2,500 acres; *also*, *one other tract*, in the county aforesaid, containing, by estimation, 667 1-2 acres of land, called *the Poison-field*. It is my desire that all my negroes, horses, and other property, be sold, and after paying my debts, the balance, if any, be remitted to my nephew, John Lambert, out of which he shall pay his mother five hundred pounds." &c.

Afterwards, on the 12th or 13th day of September, 1786, he departed this life without revoking the will or writing testamentary last mentioned; and without any other revocation of the will first mentioned, than the said writing testamentary of the 12th of September, 1786. We find, that John Harmer, mentioned in the paper-writing of June, 1782, departed this life about the year 1793. We find, that John Lambert, named in the paper-writings

aforesaid, the lessor of the plaintiff, and, if capable of inheriting lands in Virginia, heir at law to the said George Harmer; that he was born in England on or before the year 1750; that he has never resided in any of the United States of America, and is, and ever has been, from the time of his birth, a subject of the king of Great-Britain. We find, that George Gilmer aforesaid, under whose heir and devisees the defendant holds, died in the month of November, 1793. We find, that in the December session, 1798, the general assembly of Virginia passed an act, which we find at large in these words: "An act vesting in the children of George Gilmer deceased, certain lands therein mentioned (passed January 12, 1799.)

"*Section* 1. Be it enacted by the general assembly, that all the right, title and interest, which the commonwealth hath, or may have, in or to the following lands, lying in the county of Henry, which George Harmer, by his last will and testament, devised to a certain George Gilmer, and which, since the death of the said George Gilmer, it is supposed have become escheatable to the commonwealth, to wit, one tract called *Marrowbone*, containing, by estimation, 2,585 acres; one other tract called *Horse-pasture*, containing, by estimation, 2,500 acres; and one other tract called *the Poison-field*, containing, by estimation, 667 1-2 acres, shall be, and the same are hereby released to, and vested in, the children, whether heirs or devisees, of the said George Gilmer, deceased; to be by them held and enjoyed, according to their respective rights of inheritance, or devise under his will, as the case may be, in the same manner as if the said George Gilmer had died seised of the lands in fee simple, and an office had actually been found thereof; *saving*, *however*, to a certain John Lambert, who, as heir at law to the said George Harmer, claims the said lands, and to all and every other person or persons, bodies politic and corporate (other than the commonwealth) any right, title or interest, which he or they might or would have had in or to the said lands, or any part thereof, against the said children and devisees, if this act had never been made.

"*Section* 2. This act shall commence in force from the passing thereof." We find, that George Harmer was, at the time of his death, seised in fee of the lands in the

LAMBERT'S LESSEE v. PAINE.

declaration mentioned, which are of the value of 3,000 dollars, and that George Gilmer, at the time of his death, was seised of the same under the devise to him from the said George Harmer. We find the lease, entry and ouster in the declaration mentioned. On the whole matter, if the court shall be of opinion that the law is for the plaintiff, we find for the plaintiff the lands and tenements in the declaration mentioned, and 20 cents damages; and if the court shall be of opinion that the law is for the defendant, we find for the defendant."

Upon this verdict the judgment of the court below was for the defendant.

The transcript of the record contains a bill of exceptions by the defendant to the refusal of the court to the admission of testimony to prove that George Harmer, at the time he made the will, in favour of Gilmer, declared to the person who wrote it, that it was his intention to give Gilmer the fee simple.

There was also an agreement of counsel, that if the court should be of opinion, that the first will ought not to have been admitted in evidence, because not proved before a court of probate, then so much of the verdict as relates to that will, should not be considered as forming any part of this case.

The writ of error was sued out by the plaintiff, and general errors assigned. The case was argued at February term, 1803, by *Minor* and *Mason*, for the plaintiff in error, and by *Key*, for the defendant.

Minor, for the plaintiff, insisted on the following points, viz.

1st. That the devise from George Harmer to George Gilmer, dated 12th of September, 1786, of *all the estate called Marrowbone*, is only a devise for life.

2d. That John Lambert, heir at law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent.

3d. That the will of 12th September, 1786, is only a partial, and not a total revocation of the will of 25th June, 1782; and that this will passes and disposes of the reversionary interest of the testator's estate according to the legal import of that will.

4th. That by virtue of the Virginia statute transferring trusts into *possession*, the devise of 1782, transferred the legal estate to John Lambert.

5th. That John Lambert, if an alien, is capable of taking by devise, and is protected by the treaty of 1794, between the United States and Great Britain.

6th. Or that, if not, the property remains in him until office found for the commonwealth.

1st. That the devise to Gilmer is only for life.

In the first will of 1782, which is wholly written with the testator's own hand, he evinces not only a knowledge of the import, but of the necessity of technical words of limitation, or perpetuity; yet, in the will of 1786, he uses expressions which convey a life-estate only, and uses no words which can be construed into an intention, wholly to revoke the will of 1782. The first will disposes of the fee to his near relations; and hence results a strong presumption, that he meant to give only a life-estate by the will of 1786. The will of 1782, makes use of strong terms of limitation, or perpetuity, and clearly shows his intention of securing the fee simple to his brother and heir, John Harmer, who had, in fact, given him this very land. In the last will he does not notice his former will, nor mention his brother and heir, but devises "*all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2,585 acres of land*," &c. to Doctor George Gilmer.

It is generally true that a devise of real property without words of limitation, conveys only an estate for life. This is the general rule, and must prevail, unless such circumstances appear as are sufficient to satisfy the conscience of the court, that the testator

LAMBERT'S LESSEE v. PAINE.

intended to convey a fee. *Cowp.* 235, *Bowes* v. *Blackett.* So in the case of *Hogan* v. *Jackson*, *Cowp.* 306. Lord Mansfield, said, "if the words of the testator denote only a *description* of the *specific estate*, or *lands* devised; in that case, if no words of *limitation* are added, the devisee has only an estate for *life*. But if the words denote the quantum of *interest* or property, that the testator has *in* the lands devised, there the *whole* extent of his *interest* passes, by the gift, to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator. It is now clearly settled that the words, "*all his estate*," will pass *every thing* a man has; but, if the word "*all*" is coupled with the word "*personal*," or a *local description*, there the gift will pass only personalty, or the *specific estate* particularly described." And in the case of *Loveacres* v. *Blight*, *Cowp.* 355, Lord Mansfield said "in general, wherever there are words and expressions, either general or particular, or clauses, in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so *to effectuate the intention.* But if the *intention* of the testator is *doubtful*, the rule of law must take place: so, if the court cannot find words in the will sufficient to carry a fee, though, they themselves should be satisfied, beyond the possibility of a doubt, as to what the intention of the party was, they muct adhere to the rule of law. Now, though the introduction of a will, declaring that a man means to make a disposition of *all his worldly estate*, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do *alone.* And all the cases cited in the argument, to show that the introductory words in this case would *alone* be sufficient, fall short of the mark; because they contained other words, clearly manifesting the intention of the testator to pass a fee." The case of *Right* v. *Sidebotham*, *Doug.* 759, is also very strong. There the introductory clause testifies the intention of the testator to dispose of all his worldly goods and estates, and also a disinheriting legacy to the heir. The devise, then in question, is coupled by the word "*and*" with another devise to

the same devisee, *her heirs and assigns*, yet it was held not sufficient to carry the fee. Lord Mansfield says, "the rule of law is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. *All my estate*, or, *all my interest*, will do; but, "*all my lands lying in such*" a place, is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life." The same principle is laid down in *Gilbert on devises*, 24. Thus, we find that the intention of the testator must be sought by *fixed* rules, and when found, it must not only be sufficiently proved to satisfy the *conscience* of the court, but must be coupled with apt and sufficient words to pass a fee. See the case of *Frogmorton* v. *Wright*, 3 *Wil.* 418, which is a strong case for the plaintiff. So is also the case of *Chester* v. *Painter*, 2 *P. Will.* 335. In the case of *Fletcher* v. *Smiton*, 2 *T. R.* 656, the words were "*all my estates*," and the decision was upon the ground of an intention clearly appearing to dispose of his whole interest. There is nothing in the present case to show an intention of conveying a fee, unless it be the words "*all the estate* called Marrowbone, in the county of Henry, containing 2,585 acres of land." The testator does not, in the beginning of his will, as in most of the cases cited, declare an intention of disposing of *all his estate and interest*. There is a difference between the terms "all *the* estate" and "all *my* estate." The latter is certainly a more evident allusion to the degree of interest, than the former. The expressions "all *the* estate called Marrowbone" are clearly words of *locality*, and not of *interest*. What idea would a lawyer have of an estate called Marrowbone, containing 2,585 acres? Could he ascertain whether it was an estate for years, for life, or in fee? Besides, the expression is coupled with two others which are most clearly descriptive of the thing, and not of the degree of interest. "*Likewise* one *other* tract of land, called *Horse-pasture; also* one *other* tract, called *Poison-field*." Here, by the word "*likewise*," is implied that the testator meant to devise the same degree of interest in each of the tracts; and by the word "*other*," it is evident that he intended the former description as a description of a tract of land

LAMBERT'S LESSEE v. PAINE.

as to locality only, and not of his degree of interest in it. Having, in the first part of the sentence, used an equivocal word, and having, in the subsequent clause of the sentence, used synonimously a word which is certain in its meaning, and clearly descriptive of the thing, and not of the interest, it is fair to conclude that the equivocal meaning of the former, is explained and rendered certain by the latter; and that he meant no more by the word *estate*, than by the expression *tract of land*. It is a rule, that where words are used synonimously, the word most frequently used shall govern the sense. Here the term *tract of land*, is twice used as synonimous to *estate;* the former, therefore, ought to controul the sense of the latter. It is true, that "*all my estate*" has sometimes carried the fee; but to induce a departure from the general rule, the intention must be clear to pass a fee. The word, "*all*," is coupled with a *local description;* it relates to the number of acres, and not to the degree of the testator's interest in the land. The word estate, as used in Virginia, is generally understood to mean a description of the property or thing, and not of the interest; and this court will respect the provincial meaning, to come at the true intention of the testator. It is not probable, and, therefore, is not to be presumed, that he would give his estate to a stranger, and disinherit his heir, who had given him this very estate; and it is to be observed, too, that he does not, in his last will, even mention his brother John, to whom, by the first will, he had given all his estate.

2. The second point is, that John Lambert, heir at law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent.

If he is incapable of holding lands in this country, it must be because he is an *alien born*. Is he such under the legal acceptation of the word alien? A definition of an alien is thus given in *Calvin's case*, 16 (*a*) 7 *Co.* "An *alien* is a subject that is *born* out of the ligeance of the king, and under the ligeance of another." *Wood's Inst.* 23. 1 *Inst.* 198 (*b.*) 1 *Woodeson*, 386. John Lambert, the lessor of the plaintiff, was born in England in

the year 1750, under the allegiance of the king of Great Britain. At his birth he had inheritable qualities, of which he can be deprived by one mode only, and that is the commission of a crime sufficient to work corruption of blood. 1 *Bl. Com.* 371. This is not pretended.—Lambert was born within the ligeance of the king, the then common sovereign of this country and England; and, therefore, is not an alien born.

Those born under common allegiance may acquire and hold lands; and, in time of war, they may join the one, but must render service to the other, for the land.—*Bracton, b.* 5, *c.* 24, *fol.* 427. (*b.*) 1 *Hale, P. C.* 68. *Calvin's case*, 27. (*b.*) 7 *Co.* The words of Bracton are, "Est etiam et alia exceptio quæ tenenti competit ex persona petentis propter defectionem nationis, quæ dilatoria est, et non perimit actionem, ut si quis alienigena qui [*non*] fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes, nec etiam sive rex ei concesserit placitare, quia sicut Anglicus non auditur in placitando aliquem de terris et tenementis in Francia, ita nec debet Francigena, et alienigena, qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia.—Sed tamen sunt aliqui Francigenæ in Francia, *qui sunt ad fidem utriusque*, et semper fuerunt ante Normanniam deperditam, et post, et qui placitant hic et ibi, *ea ratione qua sunt ad fidem utriusque*, sicut fuit W. comes Marreschallus et manens in Anglia, et M. de Feynes manens in Francia, et alii plures; et ita tamen si contingat guerram moveri inter reges, remaneat personaliter quilibet eorum cum eo cui fecerit *ligeantiam*, et faciat *servitium debitum*, ei cum quo non steterit in personâ." See also *Calvin's case*, *fol.* 25. (*a. and b.*) 7 *Co.* A man born in the English plantations is a subject. *Wood's Inst.* 23. He that is born in the mother country must, *a fortiori*, be a subject, and capable of all the rights of a subject in the colonies. One of these rights is that of acquiring property. "All persons may convey, as well as purchase, except men attainted of treason," &c. "*aliens born*," &c. *Wood's Inst.* 233. 1 *Inst.* 42. (*b.*) But it has been proved that the lessor of the plaintiff is not an *alien born*; he, therefore, may purchase or take. If he once had an inheritable quality, or a capacity to take, and has not forfeited it by any crime, it follows that he has it yet. The separation of the colonies from England, could not, in law or

LAMBERT'S LESSEE v. PAYNE.

reason, deprive him of this right. *Calvin's case, fol.* 27. (*a. and b.*) Calvin's case was shortly this: Calvin was born in Scotland, after the crowns of England and Scotland were united on the head of James the First. The question was, whether he could maintain an assize of *novel disseisin* of lands in England. The plea was, "that he was an alien, born at Edinburgh, within the kingdom of Scotland, and within the ligeance of the king of Scotland, and out of the ligeance of the king of England." One of the objections on the part of the defendants was, that, if *postnati* were, by law, legitimated in England, great inconvenience and confusion would follow, if the king's issue should fail, whereby those kingdoms might again be divided. But to this it was answered by the judges, that "it is less than a dream of a shadow, or a shadow of a dream; for it hath been often said, natural legitimation respecteth actual obedience to the sovereign *at the time of the birth*: For as the *antenati* remain aliens as to the crown of England, *because they were born when there were several kings of the several kingdoms*, and the uniting of the kingdoms by descent subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth, *so albeit the kingdoms* (which Almighty God of his infinite goodness and mercy divert) *should by descent be divided, and governed by several kings; yet it was resolved, that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization, due and vested by birth-right, cannot, by any separation of the crowns afterward, be taken away; nor he that was, by judgment of law, a natural subject at the time of his birth, become an alien by such a matter ex post facto.* And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque regis*, as *Bracton* saith, in the aforementioned place, *fol.* 427." The present case is stronger than Calvin's. There the question was whether he had gained a right; but here it is whether he has lost one. The same rule prevailed when the Saxon heptarchy became united under the king of the *West Saxons*. *Calvin's case*, 23. (*b.*) And also with regard to the possessions held by the kings of England in France at various times, such as the *dukedom of Aquitain*, and the *earldoms of Poitiers*, *Normandy* and *Anjou*. So with regard to the islands of *Jersey*, *Guern-*

sey, *Man*, *Ireland*, &c. *Calvin's case*, 19, &c. 1 *Hale*, *P. C.* 68, 69. Suppose a division of these states, it would follow, from the doctrine contended for by the opposite counsel, that people born in the same country, and under one common allegiance, would be aliens to each other.

The kings of England themselves did homage to the kings of France for provinces which they held, such as *Normandy*, *Guienne*, *Brittany*, &c. This was also the case with many of their subjects; as in the case of the *Duke of Richmond*, *Duke D'Aubigny*, &c. *Hale*, *P. C.* 68. *Calvin's case*, 27. (*b.*) In this country the personal services are dispensed with, but the land pays the common tax or duty.

Alienage is incident to birth only, 4 *T. R.* 308, *Doe*, *ex dem. Duroure* v. *Jones*.

It is not just or reasonable that a man should be punished without committing a crime, or for an act committed by a superior power which he could not controul. Suppose a secession of one of these states; would it be just that the citizens of the other states, holding property in that state, should forfeit it, or lose their rights?

The reasons of policy for prohibiting aliens from holding lands, are stated, in *Calvin's case*, 18. (*b.*) to be three. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. But none of these apply to the present case. Lambert lives out of the realm, and, therefore, cannot betray its secrets. The land will continue to pay the taxes, which, being the sinews of war, will preserve the realm. Besides, the case applying only to the *antenati*, is limited in extent, and its operation will be constantly diminishing, by failure of heirs, by alienations, by naturalization, &c. The English, who understand the principles of the common law at least as well as we do, have allowed our citizens to inherit in similar cases. The cases of the Chichester estate, and an estate recovered by Mr. *Boyd*, and the *Earl of Cassel's* estate, are examples. A liberal policy should dictate a reciprocation of the same principle.

LAMBERT'S LESSEE V. PAINE.

The third point, viz. that the will of 12th Sept. 1786, is only a partial, and not a total, revocation of the will of 25th June, 1782; and that this will passes and disposes of the reversionary interest of the testator's estate, according to the legal import of that will, was admitted by the opposite counsel, in case the second will devised a life-estate only.

The fourth point, that by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert, was also admitted, if he is not to be considered as an alien.

The fifth point is, that John Lambert, if an alien, is yet capable of taking by devise, and is protected by the treaty of 1794, between the United States and Great Britain.

By the 9th article of the treaty "it is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they *nor their heirs* or assigns shall, so far as may respect the said lands, and the *legal remedies incident thereto*, be regarded as aliens."

The only doubt which can be raised upon this article arises from the word *hold*. But treaties ought to be liberally expounded, so as to meet the full intention of the contracting parties. There can be no doubt but the intention was to secure, not only actual possession, but rights which would have vested but for the alienage of the parties. This is apparent from the provision made for *legal remedies*, which would be wholly useless if the former expressions were meant to comprehend only lands in actual possession. If, therefore, Lambert is to be considered as an alien, yet the treaty destroys that bar to his recovery.

The sixth point is, that although Lambert should be considered as an alien, and is not protected by the treaty, yet he is capable of taking by devise, and of holding the land until office found for the commonwealth.

He certainly has a good right against all the world, except the sovereign. In England, land purchased by an alien does not vest in the king until office found. *Co. Lit.* 2. (*b.*) *Hargrave's note* (3.) 5 *Co.* 52 (*b.*) *Page's case*, 1 *Jones* 78, 79. *More*, 325, *Englefield's case*. 2 *Bl. Com.* 293. If he had been tenant in tail, he might have barred the remainder. *Goulds.* 102. 4 *Leon.* 84. An alien may take by devise, *Powell on Devises*, 316, 317, 318. 2 *Vez.* 362. *Knight* v. *Duplessis*, and may hold until office found. "For," says Powell, "when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in *to all intents and purposes*, as any other devisee would have been, until something further be done, to take the estate devised out of him again; for as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land, until office found; but if he die before office, the law casts the freehold and inheritance upon the king for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, has no retrospect to the time of its being consummate, nor does it affect the land in the hands of the devisee, until another thing is done to entitle the king, not under the devise, but by right of his prerogative; viz. *office found*; the tenant being an alien, and consequently, though of capacity to take lands *in his own right*, yet not of capacity to hold them."

Key, contra, contended,

1st. That George Harmer, by the will of 1786, devised a fee to Gilmer.

2d. That if he did not, yet the lessor of the plaintiff cannot recover.

1st. The word estate, in the devising clause of a will, where it refers to land, denotes and carries the testator's interest in the land. And there is no difference in con-

LAMBERT'S LESSEE v. PAINE.

struction of law, whether the words are "all *my* estate," or "all *the* estate." Both carry the whole interest of the testator. In the present case there are no words of locality that operate as description, and prevent the fee from passing. It is admitted that the word estate, where it is coupled with personalty, shall be restrained and will not carry the fee of lands; upon the principle *noscitur ex sociis*. This case is not within this distinction, because the word estate refers wholly to the land, and the whole personal estate is disposed of by a subsequent, independent clause. Consequently no cases can apply, but where the expressions are similar to those of the present will, and refer to lands. In the case of *Wilson* v. *Robinson*, 2 *Lev.* 91. 1 *Mod.* 100. 25 *Car.* 2. *an.* 1672, the words were "all my tenant-right estate at Brigis nd in Underbarrow," and it was held that they passed the fee. This is the general rule of law, and is uniformly supported by the authorities from the year 1672 to the present time; except the case cited by the plaintiff's counsel, from 2*d P. Williams*. The case in 2 *Lev.* 91, is exactly like the present; the word *lands* is used in the same sentence, and in the same manner as in the present case.

The word *estate*, in wills, always means the interest, unless controuled by words of restriction. Words of locality will not restrain the force of the word estate. In the case of *the Countess of Bridgewater* v. *Duke of Bolton*, 1 *Salk.* 236. 6 *Mod.* 106. *S. C.* the words were "*all other my estate real and personal not otherwise disposed of by this my will*, for to be given by him to his children as he shall think convenient, I solely trusting to his honour and discretion that he will give them such provision as will be necessary." "*Et per Holt, Ch. J.* who delivered the resolution of the court, the rents pass by these words "*all my real and personal estate*," for the word *estate* is *genus generalissimum*, and includes all things real and personal, and the *fee of the rents* passes, at least the whole *estate* of the devisor; for *all his estate* is a description of his fee. In pleading a fee simple, you say no more than *seisitus in dominico suo ut de feodo*; and in formedon, or other action, if a fee simple be alleged, you say *cujus statum* the demandant now has." And he held "that devising *all his* estate, and

all his estate in such a house, was the same, and that all his estate in the thing passed in either case."

The next case is that of *Barry* v. *Edgeworth*, 2 *P. Williams* 523, *anno* 1729, which overrules the case of *Chester* v. *Painter*, cited by the plaintiff's counsel from 2 *P. Williams* 335, *anno* 1725. In this case of *Chester* v. *Painter*, the court probably took the whole will together, and from the testator's having used the word *heirs* in some of the devises, and omitted it in the devise in question, concluded that it was not his intention to pass the fee. In the case of *Barry* v. *Edgeworth*, the words were "all her land *and estate* in upper Catesby, with all their appurtenances," and the master of the rolls held it to be decided by the case of *the Countess of Bridgewater* v. *the Duke of Bolton*, *Salk.* 236; and said, "the word *estate* naturally signifies the *interest* rather than the *subject*, and its primary signification refers thereto; and although the devise be of all her land and estate *in upper Catesby*, this is not restrictive with respect to the *estate* intended to pass by the will, but only as to the *land*." "And as the word estate has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it; for then none could give any opinion thereupon." This case refers to that of *Murry* v. *Wyse*, 2 *Vern.* 564, *anno* 1706, where the words "*all the rest and residue of his real and personal estate whatsoever*," were held to pass a fee. *Precedents in Chan.* 264. *S. C.* In the case of *Ibbetson* v. *Beckwith*, *Cases Temp. Talbot*, 157, the words were, "as touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in the manner following." Then follow two devises of "*estates*," burthened with the payment of debts and legacies, which were admitted to carry a fee; after which came the devise in question: "Item, I give unto my loving mother all my estate at Northwith close, North closes, and my farm held at Roomer, with all my goods and chattels as they now stand, for her natural life, *and to my nephew Thomas Dodson, after her death, if he will but change his name to Beckwith*; if he does not, I give him only £20, to be paid him for his life out of Northwith close, North close, and the farm held at Roomer; which I give her upon my nephew's refusing to change

LAMBERT'S LESSEE v. PAINE.

his name, to her and her heirs forever." The question was, whether Thomas Dodson took an estate for life, or in fee. The Lord Chancellor decreed that he took the fee; and said, that the word *estate* carries the fee, and that no case had been cited "to warrant the altering *the known legal signification of it.*" See also *Gilb. Devises*, 25. So in the case of *Bailis* v. *Gale*, 2 *Vez.* 48, *anno* 1750, the testator devised to his wife all that estate he bought of Mead for so long as she shall live; and in another clause said, "*I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife.*" The Lord Chancellor said, that the word "*estate* is admitted to be sufficient to make a description not only of the land, but the interest in the land;" and he held that the fee passed to Charles.

The case of *Hogan* v. *Jackson*, *Cowp.* 306, shows that the word *estate* is sufficient to pass all the interest of the testator in the thing devised. So in the case of *Loveacres* v. *Blight*, cited from *Cowp.* 355, Lord Mansfield says, "the word *estate* comprehends not only the land or property a man has, but also the *interest* he has in it." And in *Denn* v. *Gaskin*, *Cowp.* 659, he puts the words, "*all my estate*," as an example of an expression tantamount to words of limitation. See also the case of *Hodges* v. *Middleton*, *Doug.* 434, where the argument of counsel is strong to the same effect. All the subsequent cases refer to that of *Barry and Edgeworth*, 2 *P. Will.* 523, and none of them refer to that of *Chester and Painter*, in 2 *P. Will.* 335. The case of *Right* v. *Sidebotham*, cited from *Doug.* 763, does not apply to the present case, as the words of that devise were, "all my lands, tenements and houses," and not all the *estate*, as in our case. The authority from *Gilb. on Devises*, *p.* 24, is answered by *p.* 25; and the reason why a fee did not pass in the case in *p.* 24, is, because the word *estate* was coupled with personalty. The case of *Frogmorton* v. *Wright*, cited from 3 *Wilson*, 418, had no words descriptive of the testator's interest, and the case of *Fletcher* v. *Smiton*, cited from 2 *T. R.* 660, is a strong case to show that the word *estates* will carry the fee, unless restrained by other words, clearly showing a contrary intention. A description of the place cannot, in reason, restrict the operation of the word

estate, because, unless the place be named, you cannot tell either what land, or what estate the testator meant to pass.

But, it is said, there is a difference between the expressions, "all *my* estate," and "all *the* estate," and that the former more clearly indicates the *interest* than the latter. Nothing but the refinement of ingenious men could find a diversity in these expressions. When a testator is disposing of his worldly affairs, it is his *own* property that he means to dispose of, and not that of another person. When, therefore, he uses the expression, *the* estate, it means the same as *his* estate. But this subtlety of construction was soon exploded in express terms. It was suggested by the counsel, in the case of *Bailis* v. *Gale*, 2 *Vez.* 48, but Lord Hardwicke held, that it makes no difference which mode of expression is used.

So there was once an attempt made to distinguish between the words "*at*" and "*in*," such a place; but this was overruled by Lord Talbot, in the case of *Ibbetson* v. *Beckwith*, *Ca. Temp. Talbot*, 157. The word "*at*" was used in the case in 2 *Lev.* 91, and in the case before *Lord Talbot*. But the word "*in*" was used in the case of *Barry* v. *Edgeworth*, 2 *P. Will.* 523; yet the decisions in those cases were all the same way.

From this chronological view of cases, it seems clear that the word *estate*, in a will, carries the whole interest of the testator, unless there are other words clearly indicating an intention to give a less estate. No such words appear in the present will; hence it follows, that the whole interest of the testator was devised to the defendant.

But, 2dly. If Doctor Gilmer took only a life-estate, yet the lessor of the plaintiff is not entitled to recover.

1st. Because John Harmer stands before him in the first will; and if the doctrine of *antenati* is correct, it applies to him as much as to Lambert, and therefore, upon the death of Doctor Gilmer, the estate vested in John Harmer, who was the person last seised. But

LAMBERT'S LESSEE V. PAINE.

the special verdict does not find Lambert to be the heir of John Harmer, but of George Harmer, which is wholly immaterial. If Lambert is not the heir of the person last seised, he cannot recover. For if the first devise to John Harmer took effect, the contingent devise to Lambert could not; and therefore, if the latter is entitled at all, it must be as heir of John Harmer, and not as devisee of George Harmer.

Equitable estates are governed by the same rules as estates at law. George Harmer died in 1786; John Harmer died in 1793. Either John Harmer was an alien, or he was not. If he was not an alien, then he took under the devise, and it is not stated who was his heir. If he was an alien, then he was or was not competent to take as devisee. If competent to take, then the record does not state Lambert to be his heir. If he was not competent to take under the devise, neither is Lambert, for the same reason. But if Lambert can take as devisee, so could John Harmer, and the lessor of the plaintiff must then show a title under him. The will states John Harmer to be the testator's brother, and Lambert to be his sister's son; but it does not thence follow, that he was heir at law of John Harmer; for the sister might be of the half-blood. Every thing must appear in the special verdict to complete the plaintiff's title; and upon the strength of his own title only, can he recover.

But the doctrine of *antenati* is not correct. The king, under whose allegiance the two were born, is the common bond which connects the inheritable blood. The English doctrine is, that a man can never expatriate himself, and hence they have allowed our citizens, born before the revolution, to inherit to British subjects. But, by the revolution of 1776, and the declaration of independence, new relations took place. A new sovereignty was created, to which British subjects, not in this country at that time, never owed allegiance, and, therefore, they can have no inheritable bood as to lands in this country.

But it is said that Lambert, if an alien, could take and hold until office found.

If Lambert, as an alien, could take, so could John Harmer, and therefore, upon his death, the inheritance devolved upon the commonwealth, without office. *Co. Lit.* 2. (*b.*) 1 *Bac. Ab.* 81. *An alien can never take by operation of law,* and, therefore, a feme alien cannot be *endowed*, nor can an alien be tenant by the *courtesy.* 1 *Bac. Ab.* 83. An alien *purchaser* may take and hold till office found; and may protect himself against an ejectment, because no one who has not a better title, can recover against the possessor. But he cannot maintain an ejectment. If John Harmer took any thing, it was the reversion in fee, subject to the life-estate of Gilmer. If John Harmer died before Gilmer, then, upon the death of John Harmer, this reversion vested in the commonwealth. If Gilmer died before John Harmer, then, upon the death of the latter, the whole estate vested in the commonwealth.

Then, as to the treaty of 1794. John Harmer having died in 1793, and the inheritance being, by his death, cast upon the commonwealth, it was not a subject within the meaning of the treaty. John Lambert did not, at that time, *hold the land*, for it had gone to the commonwealth of Virginia. The treaty did not intend to divest a right actually vested in the commonwealth.

Mason, in reply. The word estate may mean the *interest* as well as the thing; but whether it is to have that sense annexed to it or not, depends upon the intention of the testator, collected from the whole circumstances of the case. All the facts found by the verdict are to be taken into consideration, to form a correct idea of the testator's intention. By the first he clearly meant to give the fee to his brother and his heirs. The second will does not expressly revoke the first, and contains nothing which can be construed into an implied total revocation, unless the word *estate* conveys a fee to Doctor Gilmer. All the cases which have been cited are governed entirely by the *intention of the testator.* Where the intention was to pass a fee, there the word estate has been adjudged sufficient to carry the intention into effect. The words "*the estate called Marrowbone,*" in common acceptation, mean the *tract of land* called Marrowbone. They cannot necessa-

LAMBERT'S LESSEE v. PAINE.

rily mean the fee simple, because the estate would still be called Marrowbone, whether the interest was for life or for years.

The case of *Chester* v. *Painter*, 2 *P. Will.* 336, has not been overruled. It is consistent with all the other cases. It did not appear to be the intention of the testator to give the fee, and, therefore, although the word *estate* was used, it was held that the fee did not pass. This shows that the word *estate* is not alone sufficient. Where words may be used in a large or in a contracted sense, the true construction is to be sought only by the intention of the person using them.

In the present will of 1786, there is no preamble stating it to be the intention of the testator to dispose of *all his estate* by that will; nor is there any residuary devise. As the first will is not expressly revoked, the two wills are to be considered as forming but one will. In such a case, the rule of construction is, that every clause shall be carried into effect, if possible. No repugnance shall be presumed, if the whole can stand together; and if one construction will reconcile the various parts, and another will make them repugnant, the former is to be adopted. To suppose that the word *estate*, in the last will, conveyed the fee, would be to create a repugnance to the first will, and, therefore, that construction is not to be given to the word if it will bear another. It must be admitted, that it may be used in two senses. In one it means the *thing and the interest;* in the other it means the *thing only*. The one may be termed the *technical*, and the other the *common* sense of the word. By giving it the latter construction, the two parts of the will can be reconciled, and, therefore, that construction ought to be adopted.

It is conceded, that the legal estate in the trustees cannot be set up against the *cestui que trust*. It ought also to be admitted, that this doctrine holds between those parties only; but as to every body else, the trust and the legal estate remain separate, to support the trust. In such a case the commonwealth cannot take by office found, but must sue in chancery to have the trust executed for its benefit.

It will not be contended, that the trustees were not competent to take and hold the property in trust. The

devises to John Harmer and John Lambert were contingent. If the contingency has not happened, the trustees still hold for the purpose of executing the trust when the contingency shall happen. John Harmer died in 1793, before the contingency happened upon which his devise depended. Upon his death, John Lambert's right under the will accrued. He had a title under the trust; and the treaty of 1794 protects it. The treaty is a nullity unless it protects such rights as this. If it protects only good and indefeasible titles, it is wholly useless, for such titles can protect themselves.

But if any right vested in John Harmer, then the title of Lambert is good as his heir at law. For the jury have found him to be heir at law of *George* Harmer; but he could not be the heir of George, if John left any children; and if John left no children, then is Lambert heir to John. The conclusion is irresistible; as much so as if the jury had found it. As to the objection that Lambert's mother might be sister of the half-blood, it would prevent him from being heir to George as well as to John.

February 18.

This cause was again argued at this term by the same counsel, before *Cushing*, *Paterson*, *Washington* and *Johnson*, Justices. *Marshall*, Ch. J. having formerly been of counsel for one of the parties, did not sit, and *Chase*, J. was absent.

The argument took nearly the same course as before.

Minor, for the plaintiff in error, in addition to his argument as already reported, contended that the rule of the common law, which requires words of limitation to create a fee simple, was never departed from until after the *statute of wills*; and even then the courts did not depart from, but only softened the rule; and that only in cases where the intention was clear to pass the fee. 2 *Atk.* 103, *Timewell* v. *Perkins*.

He then went into a minute examination of the following cases, viz. *Cowp.* 240, *Beawes* v. *Blackett*. 2 *Vez.* 48, *Bailis* v. *Gale*. 2 *Lev.* 91, *Wilson* v. *Robertson*. 1 *Mod.* 100, *S. C.* 1 *Salk.* 236, *Countess of Bridgewater* v. *Duke*

LAMBERT'S LESSEE v. PAINE.

of Bolton. 1 *Vez.* 228, *Goodwin* v. *Goodwin.* *Ca. Temp. Talbot*, 284, *Tanner* v. *Morse.* 3 *P. Will.* 295, *Tanner* v. *Wyse.* 2 *Vern.* 690, *Beachcroft* v. *Beachcroft*, and *Ca. Temp. Talbot*, 157, *Ibbetson* v. *Beckwith;* and from the whole deduced this principle, that the intention of the testator must be so clear as not to admit of a doubt; for if there is the smallest ground of doubt the court will not disinherit the heir.

He also cited the case of *Markant* and *Twisden*, from *Ca. Eq. Ab.* 211, pl. 22, where it was held, that the words "*all the rest and residue of my estate, chattels real and personal*," carried only a life-estate; and the case of *Bowman* v. *Milbanke*, 1 *Lev.* 130, in which the words were, "I give all to my mother, *all to my mother.*" Yet there, although every feeling of the heart is engaged in support of that filial piety which could so fervently speak its intention of giving his whole estate to his mother, it was held, that the land did not pass. In our case, the feelings are all thrown into the opposite scale: the devise is to a stranger in exclusion of the heir; and that heir the very brother to whose bounty the testator was indebted for this very estate.

"Uncertain words in a will must never be carried so far as to disinherit the heir at law. And though there be words which of themselves would disinherit him, yet, if they come in company with other words which render their import less forcible, they ought to be construed favourably for the heir." 12 *Mod.* 594, *Shaw* v. *Bull*, in which case the words of the devise were, "*and all the overplus of my estate to be at my wife's disposal, and make her my executrix.*"

In the case of *Moore* v. *Denn*, 2 *Bos. and Pul.* 247, the words of the will were, "First, I give and devise unto my kinsman, *Nicholas Lister*, all that my customary or copyhold messuage or tenement, with the appurtenances, situate and being in *Ecclesfield* aforesaid, as the same is now in the tenure or occupation of *Valentine Sykes;* all the rest of my lands, tenements, and *hereditaments*, either freehold or copyhold, whatsoever or wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment

of my just debts and funeral expenses, I give, devise and bequeath the same unto my loving wife, *Sissily Carr*, and I do hereby nominate and appoint her sole executrix of this my last will and testament." Upon this devise it was decided by the *House of Lords*, on a writ of error, that the wife took only an estate for life.

In the present case, it is sufficient for us if the words of the will are *doubtful;* for if the intention to devise the fee is not clear beyond all doubt, the presumption is in favour of the heir at law.

2. *Upon the question of alienage*, in addition to the authorities produced on the former argument, he cited *Vaughan*, 279, § 5, and 286, § 3, that a person born in the plantations may inherit lands in England; and 2 *Tucker's edition of Bl. Com. appendix, p.* 53, 54, 61, 62, that the *antenati* of England, who remained British subjects after the declaration of independence, were still capable of inheriting lands in America, or of holding those which they already possessed.*

Key, for defendant in error, upon the question of the *devise*, took the same ground as in his former argument.†

There is a difference in the effect of the word *estate*, when used in the preamble of a will, or in the residuary

* JOHNSON, J. Does not the last clause of the will of 1786, show that the testator meant, by that will, to dispose of his *whole* estate?

Mason. That clause relates only to personal estate. The word *property* is coupled with negroes and horses, which shows in what sense he meant to use it. But if it comprehends the reversion of the real estate, yet, as he appointed no person to make the sale, the reversion would descend to the heir at law, until some person should be appointed, by proper authority, to carry that clause of the will into effect.

† WASHINGTON, J. Is the will of 1782 so executed and recorded as to pass lands?

Key. The jury have found that he executed it, and it is not necessary that a *will* of *lands* should be recorded under the laws of England, and the law is considered the same in Maryland. I do not object to the will on that account.

clause, and when used in a specific devise. When used in the *devising* clause, it always carries the whole interest of the testator in the thing devised.

An argument has been drawn from the manner in which the two other estates are described; and it is said that because they are not called estates, but *tracts* of land, the devise clearly gives only a life-estate in those two tracts, and therefore it is to be presumed that the testator only meant to give a life-estate in the *Marrowbone tract*; because he has coupled them all together by the words "*likewise*" and "*also*."

But we say that he meant to give the fee of all the tracts to George Gilmer, and that the words are sufficiently large to carry that intention into effect.

In the case of *Cole* v. *Rawlinson*, 1 *Salk.* 234, the words of the devise were, "I give, ratify and confirm, all my *estate*, right, title and interest, which I now have, and all the term and terms of years which I now have, or may have in my power to dispose of after my death, *in* whatever I hold by lease from Sir John Freeman, *and also the house called the Bell Tavern*, to John Billingsley," and it was adjudged that the fee of the Bell Tavern passed, by force of the words "*and also*," which caused the preposition "*in*" to be understood, so as to read "and also *in* the Bell Tavern." So, in the present case, the three specific objects of the devise are connected by the words "likewise" and "also," and you must apply the first part of the devising clause to each subject, and read it thus: "likewise I give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate in one other tract of land called *Horse-pasture*." The word "*likewise*" shows that he meant to give the same interest in the two other tracts, which he had given in *Marrowbone*.

Upon the question of alienage, he contended, that by the common law, every man is an alien to that government under whose allegiance he was not born. The capacity to inherit results from the fact that the heir and ancestor both owe allegiance to the sovereign of the country *where the lands lie*. The right of inheritance is

derived only through one common sovereign. The allegiance due to that sovereign is the *commune vinculum* which connects the heir with his ancestor as to the tenure of lands. This common allegiance must exist at the time of the birth of the heir, and continue unbroken till the time of the descent. If this allegiance is not to be confined to the sovereign of the country where the lands lie, it would follow, that where the ancestor and heir were both natural born subjects of a foreign state, (for instance, subjects of France) and the ancestor should be naturalized in this country, and become a purchaser of lands here, the heir, although not naturalized, would still have a right to inherit those lands, because they both owed allegiance to France, their common and natural sovereign.

The American *antenati* may inherit lands in *England*, because the ancestor and heir both owed a common allegiance to the sovereign of that country, where the lands lie. But the British *antenati* never owed allegiance to the government of this country, and, therefore, the British heir cannot inherit the American lands of his American ancestor.

If, then, the capacity to inherit depends upon a common allegiance to the sovereign of that country where the lands are, it will follow, that when that common allegiance ceases to exist, the capacity to inherit must cease also. The common allegiance to the sovereign of this country ceased by the declaration of independence, or, at least, when that independence was acknowledged by the king of Great Britain, at the treaty of peace, whereby he assented to the withdrawing our allegiance; and the principle of the common law, that natural allegiance must be perpetual, is not so rigid, but that it may be shaken off with the assent of the sovereign to whom it was due. For in 1 *H. H. P. C.* 68, Lord Hale says, "that though there may be due from the same person, *subordinate* allegiances," "yet there cannot, or, at least, *should* not, be two or more *co-ordinate* absolute allegiances, by one person, to several independent or absolute princes; for that lawful prince that hath the prior obligation of allegiance from his subject, cannot lose that interest *without his own con-*

LAMBERT'S LESSEE v. PAINE.

sent, by his subject's resigning himself to the subjection of another; and hence it is, that the natural born subject of one prince, cannot, by swearing allegiance to another prince, put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested *without the concurrent act of that prince to whom* it was first due. Indeed, the subject of a prince, to whom he owes allegiance, may entangle himself, by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot, by such a subjection, divest the right of subjection and allegiance that he first owed to his lawful prince."

Hence, it is clearly the opinion of Lord Hale, that natural allegiance may be divested and dissolved, with the concurrent act of that prince to whom it was due; and by a note of the editor, in the same page, it seems that the doctrine of perpetual allegiance, refers only to a *private subject's* swearing allegiance to a foreign prince, and has *no relation* to a *national* withdrawing of allegiance.

If the American revolution is to be considered as such a national withdrawing of allegiance, then that withdrawing was complete and perfect, even before the assent of the king of England was obtained, and the American *antenati* are as totally absolved from all allegiance to the British king, as if they had been natural born aliens.

There being, then, no common allegiance between the British and the American *antenati*, at the time of the descent cast, there can be no capacity to inherit the one to the other, even were it not necessary that the common allegiance should be to the sovereign of the country where the lands lie.

Lord Hale, also, in the same page, shows in what sense *Lord Coke*, in *Calvin's case*, and Bracton before him, have used the expression, "*ad fidem utriusque regis.*" He says, "it appears by *Bracton*, that there were very many that had been antiently *ad fidem regis*

Angliæ et Franciæ, especially before the loss of Normandy; such were the *comes mareschallus* that usually lived in *England, and M. de Faynes, manens in Francia*, who were *ad fidem utriusque regis, but they ever ordered their homages and fealties, so that they swore or professed ligeance, or lige-homage only to one;* and the homage they performed to the other, was not purely *lige-homage*, but rather *feudal*, as shall be shown more hereafter; and, therefore, when war happened between the two crowns, *remaneat personaliter quilibet eorum cum ei, cui fecerat ligeantiam, et faciat servitium debitum ei cum quo non steterat in persona*, namely, the service due from the feud or fee he holds."

The opinion of the court in *Calvin's case*, 27, that if the kingdoms of England and Scotland "should be, by descent, again divided and governed by several kings," "those born under one natural obedience, while the realms were united under one sovereign, would remain natural born subjects, and not aliens," was at least an extrajudicial opinion; and it is not very clear what is the meaning of it. Does it mean that they would be natural born subjects of both kingdoms, or only of that which should remain governed by the same king? If the former, yet the case is not parallel to ours. Ours is a case where a new sovereignty has sprung up, and no person could be born under its allegiance before its existence. According to Calvin's case, allegiance does not depend upon the country in which the person is born, but upon the obedience and subjection of that country at the time of the birth. A person, therefore, born before the independence of the United States, cannot be called a natural born subject of the United States; and if he was not here at the time of the revolution, he cannot maintain a suit, as to lands in this country, but by virtue of some express stipulation in a treaty.

Mason, in reply. If the declaration of independence, and the treaty, totally divested all allegiance, so that the British *antenati* are aliens to us, it would equally make American *antenati* aliens to the British. But we all know that cases have happened, in which American *antenati* have been adjudged capable of in-

LAMBERT'S LESSEE v. PAINE.

heriting lands in Great Britain; and if those British decisions were correct, they must have been grounded upon the principle, that our *antenati* were not aliens to the king of Great Britain; and if the declaration of independence did not make us aliens to them, it could not make them aliens to us.

The American revolution only discharged the political relation which subsisted between us and the crown of England. It did not destroy individual rights or capacities. The revolution was to accomplish a great national object. No one individual can be charged with it. It was a national act, to maintain national rights, and only such rights were affected by it. It only absolved our allegiance, but did not *ex necessitate*, take away the capacity to inherit.

CUSHING, J. Are not allegiance, and the capacity to inherit, connected together?

Mason. Yes; and therefore the common law will not consider the allegiance so totally absolved as to make him an alien who was born a subject, and thereby deprive him of the right of inheritance.

Although, by the act of Virginia, in 1779, Lambert was to be considered as an alien, and incapable to sue, &c. yet that act was repealed by the treaties, and therefore he stands just where he did before the revolution.

The private rights of individuals were not affected by the revolution, except by the laws of the several states.

The object of the treaties was to put individuals as nearly as possible on the same footing as before the revolution; and the words of the treaties are sufficiently large to accomplish that purpose. They are, "and that no person shall, on that account, suffer any future loss or damage." If Lambert is on that account to be deprived of his right of inheritance, it will be such a loss, and damage, as will be a violation of the treaty of 1783.

What is common law in England, is common law in Virginia; what is law and justice there, is law and justice here.

Policy, justice, and magnanimity require that we should apply the same beneficial rule to them, which they have extended to us.

PATERSON, J. Would not the decisions have been the same in England, if there had been no such article in the treaty?

Mason. Yes, if there are no British statutes to prevent it; and the decisions would have been similar in Virginia, if there were no act of assembly on the subject.

In this position, I am supported by a very learned judge in Virginia, (Judge Tucker) who is not suspected of any improper partiality to Great Britain, or her subjects. In his notes to *Blackstone's Commentaries*, *vol.* 2, *Appendix*, *p.* 53 & 54, he says, "all persons born within the United States, whilst colonies of Great Britain, were natural born subjects of the crown of Great Britain." "The natives of the colonies, and the natives of the parent state, were, in consequence thereof, of equal capacity to inherit or hold lands in the different parts of the British empire, as if they had been born, and their lands situated in the same country. And in fact, many native Americans did hold estates in England, and on the other hand, great numbers of the natives of Great Britain, who had never been in America, possessed estates in lands in the colonies.

"By the declaration of independence, the colonies became a separate nation from Great Britain; yet, according to the principles of the laws of England, which are still retained, the natives of both countries, born before the separation, retained all the rights of birth; or, in other words, American natives were still capable of inheriting lands in England, and the natives of England, who remained subjects of the crown of Great Britain, were still capable of inheriting lands in Ame-

LAMBERT'S LESSEE v. PAINE.

rica, or, of holding those which they already possessed." And again, in page 61, he says, "By the common law, upon the separation between America and Great Britain taking place, the natives of Great Britain were constructively *natural born* in America, and, notwithstanding that separation, might hold lands here, as if they had been residents in America." After mentioning the act of assembly of Virginia, of *May*, 1779, *c. 55*, by which they were declared *aliens*, he says, "by the treaty of peace, the *common law principle*, that the *antenati* of both countries, were natural born to both, and as such, capable of holding, or inheriting in both, seems to have been revived; in consequence of which, they are now capable of *holding*, *purchasing*, or *inheriting* in the same manner as if they were citizens."

As to the question of the devise, it is not denied that the word *estate* is sufficiently large to carry the fee; nor, that the intention of the testator is to govern the construction of the will.

But, we contend that the word *estate* is not *alone* sufficient to carry the fee. It is only a word which courts will lay hold of, to effectuate the intention of the testator: but then the intention to pass a fee, must be clear beyond all manner of doubt, before the court will disinherit the heir at law.

March 1.

The judges now delivered their opinions *seriatim*

JOHNSON, J. This is a writ of error from the circuit court of Virginia to reverse a judgment in ejectment given for the defendant.

The circumstances of the case come out on a special verdict, from which it appears, that George Harmer, under whom both parties claim, was a citizen of the state of Virginia. That on the 25th June, 1782, he made a will, by which he devised "all the estate both real and personal which (he) possessed or was entitled to in the commonwealth of Virginia," to certain trus-

tees, "in trust and upon these conditions: that when John Harmer, (his) brother, (then) a subject of Great Britain, shall be capable of acquiring property in this country, then they, or the survivor of them, do convey or cause to be conveyed to him, in fee simple, a good and indefeasible title in the said estate;" and in case John Harmer should not be capable of acquiring such right before his death, he then directs the conveyance to be executed to his nephew, the plaintiff; and in case of his not being capable of acquiring lands before his death, he directs the estate to be sold and the proceeds paid over to other relations.

In the year 1786 George Harmer executes another will, which, as every part of it is material to the case before us, I will peruse at length. (Here he read the will of 1786.) The testator died soon after executing the last mentioned will. His brother, John Harmer, died in 1793, having never become a citizen.

The jury further find that John Lambert, the plaintiff, is a British subject, was born before the revolution, viz. in the year 1752, and is heir at law to the testator. The treaties with Great Britain, and an act of Virginia, vesting in George Gilmer any interest that may have escheated, are also found in the verdict. The land sued for, is a part of the Marrowbone tract. The questions suggested are,

1. What estate is conveyed to George Gilmer by the will of 1786?

2. If but an estate for life, does the will of 1782 remain unrevoked as to the remainder, so as to convey it to the plaintiff?

3. And last. Is John Lambert disqualified to inherit as an alien; or, if incapable, generally as such, is he not protected by the treaties existing between this government and Great Britain, particularly the 4th article of the treaty of London?

To form a judgment on the first point, it is necessary to consider,

LAMBERT'S LESSEE v. PAINE.

1. The general import and effect of the word estate, as applied to a devise of realty.

2. Whether its general import is controuled or altered by the subsequent words used in a similar sense in the will of 1786.

I consider the doctrine as well established, that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by *my* or *the*, or followed by *at* or *in*, or in the singular or plural number. The intent with which it is used, is the decisive consideration; and I should not feel myself sanctioned in refining away the operation of that intent, by discriminations so minute, as those which have been attempted at different stages of English jurisprudence.

The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true, that its meaning may be restricted by circumstances or expressions indicative of its being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject. To one not accustomed to the discriminations of technical refinement, it would seem that no doubt could be entertained as to the interest devised to Gilmer. The plain, ordinary import of the words would convey the idea of an absolute disposition of every article of property disposed of by the will. That words of inheritance are necessary to convey a fee, is certainly a good general rule of the common law; but, in the case of wills, it is entirely subordinate to expressions of the testator's intention.

In the case before us, there is no necessity for extending the decision of the court beyond the words made use of in disposing of the Marrowbone tract. But it is contended, that the words adopted by the testator, in devising the two other tracts, are used in the same sense as those in the first devising clause, and being of a

more restricted signification, ought to limit the word estate to a description of the mere locality. I think otherwise. When a word is made use of to which a clear legal signification has been attached by successive adjudications, it ought rather, in my estimation, to controul the meaning of those of a more equivocal purport. But the construction of a will ought to depend much more upon the evident intent of the testator, than upon the strict import of any term that he may make use of. Too critical an examination of the diction of a will is rather calculated to mislead the court, than to conduct it to a just conclusion.

I infer the intent of the testator, in the case before us, from the following circumstances, extracted from the special verdict.

1. In the first clause of the will of 1782, the testator makes use of the expression "all the estate both real and personal which I possess or am entitled to in the commonwealth of Virginia," evidently under an impression that the word estate is sufficient to convey a fee; because, out of the estate, thus devised to his trustees, he instructs them to convey to his brother, or nephew, in the alternative stated, *a good and indefeasible title in fee simple.*

2. There is no reason to infer, from any thing in this case, that the testator intended only to make a partial disposition of his property; that he intended to die intestate as to any part of it. The fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of every thing that he possesses. That such was the particular intention of this testator, I think fairly inferible from the general nature of the residuary bequest. The word *other*, in my opinion, is referible to the whole preceding part of the will, and excludes, as well the lands devised to Gilmer, as the negroes and horses which he directs to be sold. We must give it this construction, or else suppose, either that the word *property*, here used, is confined to personalty, or, that it includes every thing that he possessed, both real and personal; in which latter case it would comprise even the lands previously disposed

LAMBERT'S LESSEE v. PAINE.

of. It follows, therefore, that in the clause in which he proposes to dispose of the whole residue of his property, he omits making any disposition of any interest in the lands in question; evidently, as it impresses me, upon the supposition that he had already disposed of his whole interest in them. What object could the testator propose to himself by dying intestate as to the remainder, in fee, in the lands in question? He knew that his heir at law was an alien, and, as such, incapable of holding lands under a government to which he did not owe allegiance. This circumstance is evident from the will of 1782; and it is equally evident, from the same will, that he felt that repugnance, which is common to all men, at the idea of suffering his lands to escheat, and knew the means of preventing it.

I am, therefore, of opinion, upon the first point, that George Gilmer took a fee in the land, which is the subject of this suit; and this opinion disposes also of the second point, and renders it unnecessary for me to consider the third.

WASHINGTON, J. The only question in this cause which I mean to consider is, whether the will of George Harmer, made in 1786, passes to George Gilmer an estate in fee, or for life in the *Marrowbone* land. The words of the clause containing the bequest are, "I give to Doctor George Gilmer, of Albemarle county, all the estate called *Marrowbone*, lying in Henry county, containing, by estimation, 2,585 acres, and likewise, one other tract called *Horse-pasture*, containing, by estimation, 2,500 acres; also one other tract containing, by estimation, 667 1-2 acres, called *Poison-field*.

The rule of law most certainly is, that where, in a devise of real estate, there are no words of limitation superadded to the general words of bequest, nothing passes but an estate for life; but since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean a disposition of his whole interest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which, from their legal import, comprehend the whole interest

of the testator in the thing devised. But if other words be used, restraining the meaning of the general expressions, so as to render it doubtful whether the testator intended to pass his whole interest or not, the rule of law which favours the right of the heir must prevail. Thus, it has been determined, that the words "all my estate at or in such a place," unless limited and restrained by other words, may be resorted to as evidence of an intention to pass, not only the land itself, but also, the interest which the testator had in it. But words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike, and in the present instance, I do not recollect that a single one was read at the bar which bears an analogy to it. The case of *Wilson and Robinson*, which comes the nearest to it, is of doubtful authority. No reasons are given by the court for their opinion, and, consequently, it is impossible to know whether it was or was not influenced by other parts of the will. *Ibbetson* v. *Beckwith* was decided upon a manifest intent to pass the inheritance arising out of the different parts of the will taken together, amongst which is to be found an introductory clause which, the chancellor says, affords evidence that the testator had in view his whole estate. The cases of *the Countess of Bridgewater* v. *the Duke of Bolton*, and *Bailis* v. *Gale*, only lay down the general principle which is not denied, that the word "estate" in a will, standing alone, and unqualified by other words, is sufficient to pass the whole of the testator's interest. The words "all my land and estate," in the case of *Barry and Edgeworth* express so plainly an intention to give a fee, that I only wonder a question could have been made of it. They are quite as strong as if the testator had given the land, and all his interest in the land, where the word *estate* or *interest*, unless construed, as was done in that case, would have been perfectly nugatory. In *Goodwin* v. *Goodwin*, the chancellor doubted whether the word *estate* was not so limited and restrained by strong words of locality and description as to deprive it of the interpretation generally given to it.

LAMBERT'S LESSEE v. PAINE.

In the case now under consideration, there is no introductory clause declaratory of an intention in the testator to dispose of the whole of his estate; yet, I admit, that if he had devised all his estate called *Marrowbone*, without using other words calculated to limit the technical meaning of the word *estate*, the cases cited by the defendant's counsel would establish, beyond a doubt, that a fee passed. But I cannot read this clause of the will without feeling satisfied that the testator did not mean to use the word estate in its technical sense. For he not only varies the description of the tracts of land called *Horse-pasture* and *Poison-field*, so as to show that, with respect to them, he only meant to describe their situation and quantity; but, by using the word "other," it is plain, that with respect to the *Marrowbone* estate, his design was the same. Unless, in the disposition of this latter estate, he had described, or intended to describe it as so much *land*, he could not, with any propriety, speak of the *Horse-pasture* estate as *another tract of land*. It will hardly be said that the devise of the last tracts pass more than an estate for life, unless the word *estate*, before used, can be transferred to those tracts, so as to impart to the expressions there used, the technical meaning given to the word *estate* where it stands alone. But I cannot perceive how this is to be done without supplying words not used by the testator, and which there is no necessity for doing in order to make sense of the clause as it stands. It would, I think, be going too far to supply more than is necessary to make each devise a complete sentence, and then to introduce the preposition "in" for the purpose of making sense of the whole. Yet, if this be not done, the word estate cannot, in respect to the *Horse-pasture* and *Poison-field* tracts, be pressed into the service, and made in any manner to fit the sentence.

If only an estate for life in the *Horse-pasture* and *Poison-field* tracts passed to George Gilmer, it will, I think, be very difficult to maintain, that the word *estate*, in the same sentence, governed by the same verb, and coupled with the words which describe those tracts of land, can be construed to pass a fee.

The testator certainly uses the words *estate* and *tract of land*, as synonimous expressions; and then the question will be, whether the generality of the first shall en-

large the plain and usual import of the latter words, or the latter restrain the technical meaning of the former? I know of no case where the word *estate* is used at all, in which its general import is limited and restrained by so many and such strong expressions descriptive of the land, and totally inapplicable to the interest of the testator, as in the present. The words, *the* estate *called Marrowbone*, lying in Henry county, containing, by estimation, so many acres, excite, at first, no other ideas than such as respect the name and situation of the land, with the number of acres contained in it. The description would be equally accurate, whether the interest of the testator were a fee, or a term for years.

If, then, we are to search after and to effectuate the intentions of men supposed to be unacquainted with legal phrases, and are, on that account, to construe the words they use with indulgence, I think we shall be more likely to fulfil this duty by limiting the general import of a technical word, which, in its common use, is entirely equivocal, and is rendered particularly ambiguous in this case by the words which immediately attend it, than by giving to the words *tract of land*, a meaning which they do not, in themselves, import, and are seldom, if ever, used to express more than a local description of the thing itself.

As the opinion of a majority of the court is in favour of the defendant upon the construction of the will, I do not think it necessary to say any thing upon the doctrine of alienage, as that question may possibly come on in some other case, in which it must be decided.

PATERSON, J. The devise in the will of George Harmer, was intended to convey some interest in the *Marrowbone* farm to George Gilmer; and the quantity of interest, whether for life or in fee, is the question now to be considered. It is a fundamental maxim, upon which the construction of every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect, if it be not in contradiction to some established rule of law. In such case, the intention must yield to the rule. This intention is to be collected from the instrument itself, and not from extrinsic circumstances; and, therefore, the

LAMBERT'S LESSEE v. PAINE.

will of A can afford little or no aid in discovering the intention and expounding the will of B. Indeed, the number of cases which are usually cited in arguments on devises, tend to obscure rather than to illuminate. When, however, a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property. It cannot be questioned, that the word "*estate*" will carry every thing, both the land and the interest in it, unless it be restrained by particular expressions; for estate is *genus generalissimum*, and comprehends both the land and the inheritance. 1 *Salk.* 236. 6 *Mod.* 106. *Pr. Ch.* 264. 2 *P. W.* 524. *Ca. Tem. Talbot*, 157. 1 *Vez.* 226. 2 *Vez.* 179. 3 *Atk.* 486. 5 *Bur.* 2638. 1 *Term Rep.* 411. The word "*estate*" is the most general, significant, and operative, that can be used in a will, and, according to all the cases, may embrace every degree and species of interest. If the word "*estate*" stand by itself, as if a man devise "all his estate to A," it carries a fee from its established and legal import and operation. Standing thus *per se*, it marks the intention of the testator, passes the inheritance to the devisee, and controuls the rule in favour of the heir at law. It is true, that this word, when coupled with things that are personal only, shall be restrained to the personalty. *Noscitur a sociis.* The word "*estate*" may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. Here uncommon particularity of description is requisite, so as to leave the mind perfectly satisfied, that the thing only was in contemplation, and nothing more. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words; and thus making, instead of construing the will of the testator. But when no words are made use of to manifest the intention of the testator that the term "estate" should be taken, not in a general, but in a limited signification, then it will pass a fee; because the law declares, that it designates and comprehends both the subject and the interest. Nay, such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed. To illustrate this position by apposite and ad-

judged cases: If a man, in his will, says, "I give all my estate in A," it has been held, that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. 2 *P. Will.* 524. So the word "estate" was held to carry a fee, though it denoted locality, "as my estate at Kirby-Hall." 2 *Atk.* 37. *Tuffnel* v. *Page. S. C. Barn. Cha. R.* 9. On which *Lord Hardwicke* observed, that though this is a locality, yet the question is, whether it is such a locality as is sufficient to show the testator's intention merely to be to convey the lands themselves, and not the interest in them. He was of opinion, that the words were descriptive both of the local situation, and the quantity of interest. And in *Ibbetson* v. *Beckwith*, *Lord Talbot* observed, that the word "*estate*," in its proper, legal sense, means the inheritance, and carries a fee. Why, indeed, may not locality and interest be connected, and the same words express and convey both? To exclude interest in the subject, the expressions coupled with the word "*estate*" must be so restrictive and local in their nature, as to convey solely the idea of locality, and not to comprehend the quantum of interest, without doing violence to the words and intention of the testator. Besides, it is a just remark, repeatedly made by *Lord Hardwicke* and *Lord Mansfield*, that where a general devise of land is narrowed down to an estate for life, the intention of the testator is commonly defeated, because people do not distinguish between real and personal property; and, indeed, "common sense would never teach a man the difference;" and therefore, judges have endeavoured to make the word "estate," in a will, amount to a devise of the whole interest, unless unequivocal and strong expressions are added to restrict its general signification. It would be a laborious and useless task, to enter into a minute and critical investigation of the great variety of cases which bear on this subject. They are collected in a note by the editor of *Willes' Reports*, 296.

From the whole scope and complexion of the will of George Harmer, it is evident to my mind, that the testator intended to dispose of all his property, both with regard to the quantity and quality thereof. He did not mean to die intestate as to any part of his estate; but, on the contrary, it was his manifest intention to leave nothing undisposed of by his will. He directs that all his negroes,

LAMBERT'S LESSEE v. PAINE.

horses, and other property be sold, &c. which plainly indicates what his intention was in regard to the lands which he had previously devised. This last clause evinces and illustrates the meaning of the testator, and removes every particle of doubt from my mind, as to the true construction which ought to be put on the word "estate." To effectuate this intention, the term "estate" is to be taken in its largest signification, as comprehending both the subject and the interest, the land and the inheritance.

Amidst the great mass of cases arising on wills, it is impossible to select any two, that are exactly similar. The variety of expressions is infinite; and it is from the language, that we are to discover the intent. The same word, indeed, may be taken in a different sense in different wills, and even in different parts of the same will, owing to its *juxtaposition*, its *associations*, and the *manner* in which it is placed and used. The case of *Bailis* v. *Gale*, *in* 2 *Vez.* 48, may serve to elucidate the devise under review, in more points than one. "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." These expressions seem strongly to mark locality in contradistinction to interest. But, what says my Lord *Hardwicke*? "I am of opinion, that both the thing itself, and the estate, property, and interest the testator had, pass by the devise. Several questions have arisen in courts of law and equity on devises of this kind; but, all the latter determinations have extended and leaned as much as possible to make words of this kind comprehend, not only the thing given, but the estate and interest the testator had therein. But, it is objected, the pronoun "*my*" is not added; there was no occasion for it. It was necessary he should use such words as point out the whole interest in the land, which is sufficiently done by the other words; for he bought of Mead, the land and the fee simple in the land; which is agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest, as it is in the case of all my estate." So, in the present will, the words, "I give all the estate called *Marrowbone*," contain a description of the land, and the interest in it. The case in *Vez.* is particu-

larly applicable, and worthy of attention in another respect, as it affords a complete answer to the distinction, which was ingeniously raised, and attempted to be sustained between the import of the word "*my*" and "*the*," in devises like the present. The counsel for *Lambert* contended, that the word *the*, "*all the estate*," was descriptive of the thing; whereas, the word *my*, "*all my estate*," was descriptive of the interest as well as of the thing. But, in the case of *Bailis* v. *Gale*, Lord *Hardwicke* held, with great clearness, that there was no difference between a devise of all *my* estate at N, and a devise of all *the* estate at N; and that a fee passed in either case. Nor ought this opinion to be considered as extrajudicial; for the counsel in *Bailis* v. *Gale* insisted, that the pronoun *my* was necessary to make the devise carry a fee; and, therefore, it claimed, very properly, the notice and decision of the court. According to this opinion, a devise of *the* estate called *Marrowbone*, in the county of Henry, must have precisely the same construction and, effect, as a devise of all *my* estate called *Marrowbone*, in the county of Henry; which, it appears to me, would unquestionably give a fee.

Some expressions in a will, as, "I give my farm, my plantation, my house, my land," do, of themselves, contain no more than a description of the thing, and carry only an estate for life, because unconnected with words of inheritance, or other words of a similar import. For we are not permitted to enlarge the estate of a devise, unless the words of the devise itself be sufficient for that purpose. In the present devise, the words, "all the estate called *Marrowbone*," are competent to carry the degree of interest contended for on the part of the defendant; and this construction accords with the intention of the testator, as disclosed by his will. Whether it would not have been more beneficial to society to have observed, from the first, the same technical phraseology and strictness of legal terms in devises, as in conveyances of landed property, is a question which may amuse the theoretical jurist; but which, as judges, we cannot seriously discuss; for it is a leading axiom in our system of jurisprudence, not to be shaken by judicial authority;

LAMBERT'S LESSEE v. PAINE.

that the intent of the testator, so far as it is consistent with the principles of law, must be attended to, and controul the decision. I am, therefore, of opinion, that the words, "I give to George Gilmer all the estate called *Marrowbone*, in the county of Henry," give a fee, being descriptive equally of the quantity of interest, and locality of the thing devised.

CUSHING, J. The first question in this case is, whether the devise to George Gilmer, in the will of George Harmer, made in 1786, carries a fee by the words "all the estate called *Marrowbone*, in the county of Henry, containing, by estimation, 2,585 acres of land," &c.

Wills are expounded more favourably, to carry the intent of the testator into effect, than conveyances at common law, which take effect in the life-time of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of council learned in the law. Therefore, words not so technical for the purpose, have, in a great variety of cases, for above a hundred years, been construed by the judges, to carry a fee, which would not do so in a deed.

In a number of cases, the word "*estate*" has been determined to comprehend the whole interest in the land. Among those adduced, there are several which appear to me essentially in point to the present case.

In the case, 2 *Lev.* 91, (a case which has since been held, by good judges, to be good law) a devise of "all *my* tenant right estate, at B. in Underbarrow," was determined to import a fee.

I see no essential difference between that case and this; except the particle "*the*" instead of the pronoun "*my*," which, in common sense, and in the opinion of Lord Hardwicke, makes no difference. "*All the estate*" is, at least, as extensive and comprehensive as "*all my estate.*"

In 2 *P. Will.* 523, the words "all my lands and estate in upper Catesby, in Northamptonshire," were adjudg-

ed to carry a fee. That agrees with the case at bar, except that the word "*lands*" precedes "*estate*," which I think immaterial. "*Estate*" is the most operative word.

In the case of *Bailis* v. *Gale*, 2 *Vez.* 48, a devise of "*all that estate that I bought of Mead*," was determined by Lord Hardwicke to be of a fee. This, I think, is substantially like the case at bar; and by him, *that*, *the*, or *my*, makes no material difference. Add to this, what seems to make the point conclusive, the testator appears to have a design to dispose of his whole estate.

The other cases cited do not appear to contradict these; but, varying in some circumstances, seem not so directly applicable; yet, by the spirit and reasonings attending them, they tend to confirm the rectitude of the other decisions which are more directly in point.

The latter part of the devise in question, of several tracts of land immediately succeeding the devise of "*all the estate called Marrowbone, in the county of Henry*," &c. if considered as not carrying a fee, I conceive, would not, however, controul or restrict the prior part of the devise of "*all the estate called Marrowbone*," &c. Rather than that, I should suppose the former part would carry spirit and meaning to the latter. But that is not necessary now to be determined.

The first point being determined in favour of the defendant, the former judgment must be affirmed.

HODGSON *v.* BUTTS.

A *mortgage* of chattels in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded.

ERROR to the circuit court for the district of Columbia, sitting at Alexandria, in an action for money had and received, to recover from the defendant, who was master of the schooner Mississippi, the amount of freight received by him subsequent to the mortgage of the said schooner, by R. & J. Hamilton, (the former owners) to the plaintiff.

On the trial of the general issue, the plaintiff took two bills of exception, and the verdict was for the defendant.

The first bill of exceptions stated the following facts:

That the plaintiff, to support his claim, produced a deed from R. & J. Hamilton, by which they bargained and sold to the plaintiff the schooner Mississippi, then in the port of Alexandria, and the cargo of the ship Hannah, then at sea, as security to indemnify and save harmless the plaintiff, as indorsor of their notes, to the amount of 10,000 dollars. If they should indemnify him within days after the arrival of the cargo of the ship Hannah, if it should arrive before the return of the schooner Mississippi from her then intended voyage to New-Orleans; or, if the cargo of the Hannah should not arrive before the return of the schooner, then within days after her return, then the deed should be void: but, if they should fail to indemnify the plaintiff within the periods mentioned, then he was to sell the cargo of the Hannah, and the schooner and cargo. The deed also contained the following covenant: "And we do moreover bind ourselves, our executors and administrators, and also the *freight* and inward cargo of the said schooner Mississippi, to exonerate the said William Hodgson from," &c. "It being the true intent and meaning of these presents, to bind ourselves, our schooner called the Mississippi, her tac-

kle, apparel and furniture, her *freight* and inward cargo, and the cargo of the ship Hannah, to exonerate," &c.

The execution of the deed was in the following form:

"In witness whereof, the said Robert and James Hamilton have hereunto set their hands and affixed their seals, this fourth day of May, 1800.

ROBT. & JAS. HAMILTON, (seal.)

Signed, sealed and delivered, in the presence of

CH. SIMMS,
JAMES D. LOWRY."

"At a court of Hustings, held for the town of Alexandria, the sixth of October, 1800, this bill of sale, from Robert and James Hamilton to William Hodgson, was proved to be the act and deed of the said Robert Hamilton for self and for James Hamilton, by the oaths of Charles Simms and James D. Lowry, witnesses thereto, and ordered to be recorded.

G. DENEALE, *Clerk*."

The plaintiff also produced, in evidence, the register of the schooner, with an indorsement thereon, in these words, "At the request of the within named Robert and James Hamilton and William Hodgson, merchants, of the town of Alexandria, I hereby certify, that the within mentioned vessel is mortgaged by the said Robert and James Hamilton to the said William Hodgson, to secure the payment of the sum of ten thousand dollars, as witness my hand, this thirteenth day of May, one thousand eight hundred.

CHAS. PAGE, *Dy. Collr.*"

It was proved, that the said register, with the indorsement thereon, as aforesaid, was delivered to the defendant previous to the sailing of the said schooner. That

HODGSON v. BUTTS.

she sailed from Alexandria to New-Orleans about the 14th of May, 1800, from New-Orleans to Jamaica, and from Jamaica she arrived at Alexandria about the 27th of November, 1800; at which time, and not before, she was put into the actual possession of the plaintiff, *under a new and absolute* bill of sale, executed by Robert and James Hamilton to the plaintiff, at that time. That the defendant received the freight of the cargo, carried from New-Orleans, at Jamaica. No evidence was adduced to show that the plaintiff had ever given notice to the defendant that he should look to him for the freight (other than the indorsement on the register.)

On the part of the defendant, evidence was adduced, to prove that R. and J. Hamilton, on the 12th May, 1800, were indebted to a certain John Haynes, in the sum of 384 dollars, for wages as a seaman, previously earned; 184 dollars of which were earned on board the said schooner, and 200 on board another of their vessels. That being so indebted, R. Hamilton, on the 13th of May, 1800, gave the said Haynes an order on his brother James, then in New-Orleans, stating a balance of 384 dollars, to be due to him, with some interest, and requesting his brother to pay it. That on the same day, they were indebted to the defendant, in the sum of 800 dollars, for wages due him, as master of, and disbursements on account of the schooner, *on a previous* voyage, which sum R. Hamilton requested his brother James, at New-Orleans, to pay, by letter of that date. That the defendant received his sailing-orders and instructions from R. Hamilton, in the name of R. and J. Hamilton, on the 14th of May, 1800, before he sailed from Alexandria. That the vessel was conducted entirely under the directions of R. and J. Hamilton, from the date of the mortgage, on the 4th of May, 1800, until the 27th of November, 1800, when she was delivered to the plaintiff.

That on the voyage from Alexandria to New-Orleans, the defendant met James Hamilton, in the river Mississippi, and showed him the orders in favour of the defendant and of John Haynes, and requested payment. That James Hamilton replied, that he had no money to satisfy the said orders; that the defendant

must wait *until the vessel earned enough* to pay them, and desired the defendant to pay them out of the first money the vessel should earn, by freight or otherwise. That the vessel proceeded to New-Orleans, and from thence with a cargo to Jamaica, where the freight was received, and out of the same the defendant paid Haynes the 384 dollars, and applied 800 dollars to the discharge of his own claim. That the vessel then sailed from Jamaica, and arrived at Alexandria on the 27th of November, 1800. That after her arrival, and after possession delivered to the plaintiff, the latter paid the expenses and disbursements of the voyage, which became due on her arrival, by the orders of the defendant. The plaintiff also insured the vessel for the said voyage, and paid the premium thereon, after her departure for New-Orleans. It was also proved, that on the defendant's return to Alexandria with the vessel, and before the plaintiff took possession of her, and received his absolute bill of sale, as aforesaid, the defendant rendered to, and settled with R. and J. Hamilton, an account current of the expenses and profits on the said voyage, in which they gave credit for the order in favour of himself, and that in favour of Haynes.

Upon this statement of the evidence, the plaintiff prayed the court to instruct the jury, that he was entitled to recover of the defendant, the sum of 1184 dollars, thus admitted to have been received for freight, and applied to the discharge of the two orders; which the court refused to do, and directed the jury to find a verdict for the defendant, if they found the facts to be as stated.

The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that if they should be of opinion, from the evidence aforesaid, that the defendant received information of the mortgage from Robert Hamilton, before the schooner sailed upon the said voyage, the plaintiff was entitled to recover the said 1184 dollars, which the court also refused to do, and directed the jury, as before, that their verdict ought to be for the defendant.

This case was first argued at February term, 1804.

Hodgson v. Butts.

February 27, 1804.

E. J. Lee, for plaintiff in error.

The law of mortgages is the same both as to land and personal property.

The case is to be considered, first, upon common law principles; and second, upon the statute law of Virginia.

First point. That the mortgagee is the legal proprietor of the mortgaged subject; and as such, he is entitled to receive the rents and profits after notice of the mortgage, unless the contrary be stipulated.

The mortgagee of lands leased becomes entitled to the rent from the time of executing the conveyance; for the rents and profits, as well as the land, are liable for the debt.

As soon as the conveyance is executed, the estate is, in law, vested in the mortgagee, and his power to take actual possession exists from that moment. For these principles, see *Powell on Mortgages*, 79, 80, 81.

The mortgagee is the absolute proprietor and the true owner, 1 *Vez.* 361. *Ryall* v. *Rowles*.

If lands be mortgaged to one, the interest in them is in the mortgagee before forfeiture; for he has purchased the lands upon a valuable consideration, as the law will intend; and though the mortgagor may redeem by means of an agreement between the parties, if he does not, the estate, in law, is absolute, without any other act to be done, to pass the estate; although the mortgagor has in him the equity of redemption, 15 *Viner*, *Abridg.* 44.

A mortgage is defined to be the appropriation of a specific thing to certain purposes. It does not, in the case of a mortgage, require the delivery of the article, in order to transfer the right and title to it.

A mortgagee of real property may bring an ejectment to get possession against any person in possession; and may also bring an action for the mesne profits; so he may bring trover for personal property, and in the estimation of his damages, a charge for the intermediate produce or profits of the article converted would not be rejected, but would be taken into the account. So he may bring detinue, without any proof of possession in the mortgagee.

2d. Possession, upon common law principles, is not necessary in order to give title in the transference of property. It is true, that possession in the vendor, after the transfer, is *prima facie* evidence of fraud, and this is the only effect of such possession; but as to the proof of fraud, it is not conclusive. It may be rebutted by testimony showing the transaction *bona fide*.

The only use in delivering possession, is to prevent strangers being deceived by a false credit, which the possession in the vendor is calculated to produce. This reason cannot be applicable in this case to *Butts*. 1. Because Butts knew of the mortgage. 2. Because the debt due to him from the Hamiltons was an antecedent debt.

If the Hamiltons had been declared bankrupts, their assignees could not have claimed the vessel or the freight; because both were pledged as a security to Hodgson. See the bankrupt law of the United States.

Upon common law principles, the mortgagee must be considered as the legal proprietor of the vessel.

3d. But the act of the legislature of Virginia, places the question beyond a doubt, and proves that possession is not necessary to constitute the ownership. *See Virginia laws*, 157, *revised code of* 1802. 1 *Washington*, 177.

The legal owner of the vessel is entitled to receive the freight, *Marshall on Insurance*, 93.

The mortgagee of a vessel in a late case has been considered as the owner, and as such, liable for repairs done to her before he received actual possession. 7 *Term Rep.* 306. In this case the decision in *Chinnery v. Blackburne*, 1 *H. Black. Rep.* 117, is not considered as correct.

The two cases of *Jackson* v. *Vernon*, 1 *H. Black.* 114, and *Chinnery* v. *Blackburne*, which will be relied on by the defendant, will, upon examination, be found not to meet the question which arises in this case.

In the case of *Jackson* v. *Vernon*, the question was, whether the mortgagee was liable for the repairs to the ship; it was decided he was not, because, the mortgagor himself ordered the repairs; as the person who makes repairs on a ship, has a claim on the person ordering them, it was supposed the credit was given to him, and upon this ground it was held the mortgagee was not liable.

In the case of *Chinnery* v. *Blackburne*, Merryfield, acted as the owner; he navigated the vessel, and made all contracts about her, from London to Antigua. He was on board of her on the voyage, and at Antigua gave the command of the vessel to another captain; he also insured the vessel; and at Antigua, acted personally in command of the ship. This is not like the case at bar; for in this, Hamilton did not furnish the vessel, or man her after the mortgage, nor did he insure her; but Hodgson did the last act. But both cases are doubted in the case 7 *Term*, 306, and *by Abbott*, 16, who says, they do not furnish a case for the decision of the question, who is entitled to the freight, which a case of a contract made by the master in that character, will; which is our case.

There is a distinction in a court of equity and a court of law, where the mortgagor acts as the master of the vessel. In the court of equity, he is considered as owner; but not so in a court of law. *Marsh.* 452. 453. Hamilton never acted as master.

4th. The contract in words, binds and includes the freight. To which it is objected, that future freight is too remote an interest, to be transferred; freight, or a hope, or expectation, is such an interest as may be insured; and, if insurable, it may be granted.

Goods, as well as their expected produce, may be granted, *Prec. Chancery*, 285. It is not competent for Butts, who claims under Hamilton, to object that the freight it not included or passed by the deed. *Cowp.* 600.

5th. The objection, that Robert Hamilton exercised authority over the vessel, by giving instructions, is not of any weight, in the mouth of Butts; because Butts had a full knowledge of the *lien* of Hodgson; and also, because it does not appear that Hodgson authorised this interference.

The directions of James Hamilton, that Butts was to wait until the vessel earned enough to pay him, is also without weight; because James Hamilton was ignorant of the arrangement which his partner had made; and of which Butts might have informed him; but not having done so, he is the more culpable.

6th. Hamilton had no right to appropriate the freight to any other person, than that specified in his deed of mortgage. If *he* had not, Butts, his servant, had not.

Butts must be considered, either as the servant of Hamilton, or of Hodgson; if the servant of the former, and undertakes to act as such, he had no right to apply the money in the manner he did. If he undertook the command as Hodgson's servant, he had no right to apply the freight to the payment of a debt due from Hamilton.

7th. Butts having accepted of the command of the vessel, with a full knowledge of the *lien* upon her, and her future freight, he tacitly consented to apply the freight according to the agreement between Hamilton and Hodgson; if he intended otherwise at the

HODGSON v. BUTTS.

time, he has been guilty of a fraud, which ought not to avail him in a court of law.

8th. The captain had no *lien* for his 800 dollars, due for his own wages on the vessel. The mate had no *lien* on this vessel, for 200 dollars, they being earned on board of a different vessel, and in a different voyage. The balance of the mate's wages, was only 184 dollars. The mate, by accepting an order on James Hamilton, for 384 dollars, the whole of the wages due him, agreed to accept payment in a different way from the usual one; which destroys the *lien* on the vessel, for the 184 dollars. *Salk.* 131.

Besides, for this 184 dollars, Butts, as the captain of the vessel when it was earned, was liable; and the moment he paid that sum, the mate's *lien* was gone. The captain has no *lien* on the vessel for the wages he pays the seamen, but has on the freight, for the wages of the voyage in which the freight was earned. The mate, by assigning the bill on James Hamilton, could not assign any *lien* he had on the vessel.

9th. As to the justice of the case. Hodgson has paid the seamen's wages for the voyage which earned the freight; and Butts is to receive the benefit.

Jones, contra. *First*, as to the validity of the deed, and

Second, as to its effect, if valid.

1st. The vessel was in port at the time of the deed, and, therefore, (possession not having been delivered) it is void as to creditors. The possession is dispensed with only when the vessel is at sea. 1 *Cooke, B. L.* 339, *Stevens* v. *Cole*. *Id.* 357, *Hall* v. *Gurney*. 1 *Wilson*, 260, *Ryall* v. *Rolle*, and the case of *Russel* v. *Hamilton*, in this court, *ante*, *vol.* 1, *p.* 309.

As to the act of assembly, if the deed would have been bad without recording, there is nothing in the act to make it good. From affirmative words a negative may sometimes be implied, but not *e converso*. The words of the act are, "all deeds of trust and mortgages whatsoever

shall be void as to all creditors and subsequent purchasers, *unless* they shall be acknowledged or proved, and recorded according to the directions of this act." That is to say, a deed, although good in every other respect, yet, if not acknowledged or proved, and recorded, shall be void. It cannot possibly be construed to make good a deed which would have been before fraudulent.

2d. The deed is also void for want of containing the register according to the directions of the act of congress, *vol.* 2, *p.* 147, § 14. This act is mandatory, and if the construction of the act of assembly contended for is correct, the register is necessary; for the affirmative words of the act of congress imply a negative as strongly as the act of assembly implies an affirmative.

3d. The plaintiff waived this deed, by taking possession under a new and absolute deed of the same property, before the mortgage was forfeited, and before he had exercised any right of ownership. This new deed implies a new consideration, and that a new bargain was made, by which the old contract was waived.

4th. The consideration of the deed was, *indemnity*. A mere possibility of suffering is not a sufficient consideration against third persons. It is only good between the parties.

Second point. As to the effect of the deed, if valid.

The plaintiff, by the terms of the deed itself, could not meddle with the schooner, until days after her return from her then intended voyage to New-Orleans, and a failure on the part of the mortgagors to indemnify him; and his only authority then would be to sell the vessel and cargo, if not previously sold by the mortgagors.

If, then, the defendant did know of the mortgage, he must be presumed to know the whole terms; and that the plaintiff could not interfere till long after his return. He also knew, that before a forfeiture of the mortgage, and while the mortgagor holds the possession, the latter is to be considered the owner. 1 *H. B.* 114, *Jackson* v. *Vernon*, and 1 *H. B.* 117, *Chinnery* v. *Blackburne*. Even in the case of lands, a mortgagor has been held to

Hodgson v. Butts.

be a freeholder, and entitled to vote at elections. And the mortgagee of a leasehold estate, cannot be sued by the lessor as *assignee* of the lessee, until the mortgagee is in possession, although the mortgage be forfeited, and he has a right of possession. *Doug.* 455, *Eaton* v. *Jacques.* *Doug.* 22, *Keech* v. *Hall.*

The mortgagors had a right to receive the freight, and if so, they had a right to appropriate it. The freight is not like rent, which is said to grow out of the land. It depends upon a mere personal contract. If they had received the freight, their receipt would have been good against the plaintiff.

As to the payment of the expenses of the voyage by the plaintiff, it was voluntary. He had his reasons. He made a new contract, and paid the money after he had possession under his absolute purchase of the vessel.

The extrajudicial doubts of Lord Kenyon and Abbott, cannot controul the strong and decisive cases of *Jackson* v. *Vernon*, and *Chinnery* v. *Blackburne.*

As to the covenant respecting the freight, it is merely a personal contract, and the plaintiff trusted to the personal security of the mortgagors. Even if they had sold the inward cargo, the plaintiff could not recover against the vendees. But the freight was not even a *chose in action.* It was only a possibility. It was not in being, and, therefore, not capable of a legal assignment.

Swann, in reply. The vessel was of less value when she returned than when she was mortgaged, by at least the difference of the freight. Hodgson paid the expenses of the voyage. It is equitable, therefore, that he should receive the freight. The defendant had no *lien* on the vessel or freight.

Two questions seem to arise in this cause.

1. What relation does the mortgagor stand in to the mortgagee?

2. What relation does the defendant stand in to both?

1. By the English law, possession must accompany the deed, except as to vessels at sea. But here possession is not necessary, if the deed be proved and recorded in a certain manner. It is then as valid, to all intents and purposes, as if possession had been delivered with the deed.

The court said, he need not argue that point. It had been settled.*

Swann. What then are the rights which it conveys? As to mortgages of lands, the law is settled; but not so in the case of a mortgage of a ship. In England it is settled, that a mortgagee of a ship in possession, is entitled to all the rights of property. But if a vessel be mortgaged while at sea, some doubts have arisen. But here, by the statute, the deed has the same effect as if possession had been given. The mortgagee, therefore, has all the right of property; and if in the thing itself, he has it also in its profits.

But this is not a mere mortgage. It is also an assignment of the freight itself. It is said to be the general understanding, that the mortgagor shall enjoy the profits until forfeiture, or possession given to the mortgagee. But if the mortgagor covenants expressly, that the mortgagee should receive the profits, this destroys the tacit presumption that the mortgagor should receive them. At best, a mortgagor is only "*like* a tenant at will," and the mortgagee may put an end to his right of taking the profits whenever he pleases. He has the legal title to the rent. *Doug.* 282. *Moss* v. *Gallimore.* But it is said, that the freight was not *in esse*, and, therefore, could not be the subject of an assignment. But if the covenant does not operate as an assignment of the freight, it is sufficient to destroy the tacit understanding, that the mortgagors were to receive and might dispose of it as they pleased.

2. In what relation does the defendant stand to the other parties?

Here was no fraud on him. He had notice of the mortgage, and the appropriation of the freight to secure

* Probably alluding to the case of *Claiborne* v. *Hill*, 1 *Wash.* 177.

HODGSON v. BUTTS.

the plaintiff, before the vessel sailed. He took *an order* for his money on James Hamilton; which shows, that when he sailed, he did not depend upon the profits of this voyage, as to his claim of 800 dollars. If he had any *lien* on the freight, it was only for his wages arising during the same voyage. If there was any fraud, it was on *his* side. He never disclosed his claim to the plaintiff before he sailed, nor after his return, until the plaintiff had paid the expenses of the voyage. The record of the mortgage was notice to him, even if we had not proved actual knowledge on his part. The mortgagors and the defendant, as their agent, were trustees for the plaintiff.

If a mortgagee of lands chooses to lay by, and not demand the rents, and the tenants pay them to the mortgagor, they shall be protected. But why? Because they had not notice. But if they pay the rent to the mortgagor after notice from the mortgagee, they pay in their own wrong. This is the case of the defendant. He knew that the mortgagors had no right to appropriate the freight.

February 28, 1804.

MARSHALL, Ch. J. mentioned to the counsel, that the court had doubts whether the mortgage was not void, for want of *three* witnesses, under the act of assembly, *Revised Code*, *p.* 165, for regulating conveyances. They, therefore, continued the cause, to ascertain whether any, and what decisions, had been made in Virginia upon that point.

February 25, 1805.

E. J. Lee, for plaintiff in error. The question now is, is it necessary that the mortgage should be proved by *three* witnesses?

By the second member of the second section of the statute to prevent frauds and perjuries, it is declared, "if a conveyance be of goods and chattels, and be *not*, on consideration, deemed valuable in law, it shall be taken to be fraudulent within that act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged or proved; if the same deed include lands

also, in such manner as conveyances for lands are directed to be proved and recorded, or if the conveyance be of goods and chattels only, then acknowledged or proved by *two* witnesses in the general court, or the court of the county in which one of the parties live, within eight months, or unless possession shall really and *bona fide* remain with the donee," &c.

By this law, if the conveyance is of goods and chattels, for a consideration not deemed valuable in law, and is proved by two witnesses, or possession is with the donee, it gives a title.

From this part of the act, the natural and only inference is, that if a conveyance is for a consideration deemed valuable in law, that it must be valid, and transfer property as absolutely as a conveyance for a consideration not deemed valuable, proved by two witnesses.

The latter part of this section includes a mortgage, or any other conveyance with a condition or limitation.

The first branch of the second section declares all conveyances not made with a view to defraud creditors or purchasers, is good, and does not require its being recorded.

The third section of this act refers to the first branch of the second section, both being taken from the statute of Elizabeth.

The whole of the fourth section of the act regulating conveyances, relates to four different objects. 1st. An estate of freehold in lands. 2d. An estate of inheritance in lands. 3d. An estate for a term of years in lands. 4th. Deeds of settlement upon marriage, wherein lands, slaves, money, or other personal thing, shall be settled or covenanted to be left, or paid at the death of the party, or otherwise, and all deeds of trust or mortgages whatsoever, that is, the consideration of which is marriage, or which relate to lands. These general words are to be construed as referring to the previous subject matter of this section, and of the previous sections.

HODGSON v. BUTTS.

If the act against frauds and perjuries include not this deed, then we are to inquire what was necessary at common law to pass a title to property.

Personal property at the common law might be acquired, the books say, in twelve different ways. Among them, one is by grant or contract. A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing.

No particular form is prescribed as to making the contract, whether it must be in writing or otherwise; it is sufficient if the contract is proved.

And all persons who have notice of the contract are bound by it. If A sell to B verbally, in the presence of C, a horse, and C afterwards buy the same horse of A, will it be said C's title is good?

No; because the contract with B transfers the property. 2 *Black.* 447, 448.

The contract for the freight is good; the law does not require a contract to pay money out of a particular fund, to be recorded.

The whole tenor of the act for regulating conveyances, shows that it relates to real estate only, except in the single case of marriage settlements, which are specially provided for.

But there is another error apparent in the record.

The plaintiff paid to the defendant the seamen's wages, upon the faith of receiving the freight. If he was not entitled to receive it, he has paid those wages by mistake, and may recover them back in this action against the defendant, to whose orders they were paid.

Swann, on the same side. The fourth section of the act for regulating conveyances says, that all deeds of trust and mortgages *whatsoever*, shall be void, unless they shall be recorded according to the directions of that act; that is, in the county where the "*land conveyed lieth.*" Where, then, is a deed of mere personal property

to be recorded? This shows, that the legislature meant only deeds of trust and mortgages of *land*.

C. Lee, on the same side, contended, that there was no statute respecting conveyances of personal property on valuable consideration. The statute of frauds speaks only of conveyances made on consideration, not deemed *valuable* in law. The word *good* consideration in the 3d section, means *valuable* consideration, otherwise it would be repugnant.

Jones, contra. It is contended, now, that if the mortgage is void, and the plaintiff had no right to receive the freight, he has paid the expenses of the voyage by mistake, and can recover upon that ground. But there is no evidence that the expectation of the freight was his motive for paying those expenses. On the contrary, he did not pay them until after he had taken possession of the vessel, under a new contract, as an absolute purchaser. The record does not state how much he disbursed, and, therefore, we cannot say how much he is entitled to recover back, even if he is entitled to recover any thing. But the defendant never received the money from the plaintiff for those disbursements. It is true he gave orders to the plaintiff to pay, but those orders were not for his own use, and he never actually received the money.

March 2, 1805.

MARSHALL, Ch. J. delivered the opinion of the court.

This suit was instituted to recover the freight of a vessel of which the plaintiff was a mortgagee. Upon inspecting the deed, which is the foundation of the action, it appears to have been admitted to record, on the oath of only two subscribing witnesses. This suggested the preliminary question, whether a deed of mortgage, so recorded, was not absolutely void as to creditors and subsequent purchasers? This question depends on the construction of two acts of the legislature of Virginia. The first is entitled, "An act for regulating conveyances." The 4th section of that act is in these words;

"All bargains, sales," &c. The first member of the sentence relates to lands only, the second to marriage settlements, wherein either lands or personal estate should be settled; and the third relates to deeds of trust and mortgages. Terms descriptive of personal estate are omitted, but the word "whatsoever" would certainly comprehend a mortgage of a personal chattel, as well as of lands, if not restrained by other words manifesting an intent to restrain them.

It is argued, that this intent is clearly manifested. The whole act relates to real estate, except that part of it which respects marriage settlements. Its title is "an act concerning conveyances," and all its provisions are adapted to the conveyance of lands, except in the particular case of marriage settlements; and in that case, the act provides expressly for recording a settlement of chattels. This act, it is said, contains no "directions" for recording a deed of trust or mortgage for a personal thing, and, consequently, such deed cannot be within it.

The first section of the act respects conveyances of lands only, and directs, that they shall be acknowledged or proved by the oath of three witnesses in the general court, or court of the district, county, city, or corporation in which the lands lie.

The second respects marriage settlements, and directs, that if lands be conveyed or covenanted to be conveyed, they shall be proved and recorded in the same manner as had been prescribed in the first section; but if only slaves, money, or other personal thing be settled, the deed is to be proved and recorded before the court of the district, county, or corporation in which the party dwells, or as afterwards directed.

The third section relates only to the proving and recording of livery of seisin.

Then follows the fourth section, which requires, among other enumerated conveyances, that "all deeds of trust and mortgages whatsoever" shall be void as to creditors and subsequent purchasers, if not acknowledged or proved, and recorded "according to the direc-

tions of the act." There being no "directions" which are applied to mortgages, unless lands be conveyed in them, it has been argued, that such mortgages only, as convey lands, are comprehended within the act.

The act, it must be acknowledged, is very obscurely penned in this particular respect, and there is so much strength in the argument for confining it to mortgages of lands, that, if a mortgage of a personal chattel could be brought within the provisions of any other act, the court would be disposed to adopt the construction contended for.

The plaintiff insists, that such a mortgage is comprehended in the 2d section of the "act to prevent frauds and perjuries."

That act avoids fraudulent conveyances; and declares, that deeds of personal chattels, not upon a valuable consideration, where the possession remains with the donor; or, a reservation of interest in the donor, where possession passes to the donee, shall be fraudulent and void, unless proved and recorded according to the directions of the act. A mortgage made on a valuable consideration, would be very clearly excluded from the 2d section, although the act contained nothing further on the subject. But to remove the possibility of doubt, the 3d section declares, that the act shall not extend to any conveyance made "upon good consideration and *bona fide*."

The meaning of the word "good," in the statute of frauds, is settled to be the same with "valuable."

It is, therefore, perfectly clear, that the case is altogether omitted, or is provided for in the act concerning conveyances. In a country where mortgages, of a particular kind of personal property, are frequent, it can scarcely be supposed that no provision would be made for so important and interesting a subject. The inconvenience resulting from the total want of such a provision would certainly be great; and the court, therefore, ought not to suppose the case to be entirely omitted, if there be any legislative act which may fairly be con-

strued to comprehend it. The act concerning conveyances, although not penned with that clearness which is to be wished, does yet contain terms which are sufficient to embrace the case, and the best judicial opinions of that state concur in this exposition of it.

Although the point was not directly decided in the case of *Hill and Claiborne*, the court of appeals appear to have proceeded on this construction; and Judge *Tucker*, in discussing this subject, avows the same opinion.

Upon a consideration of the acts on this subject, Butts being a creditor, it is the opinion of the court, that the deed of mortgage, in the proceedings mentioned, was void as to him.

The counsel for the plaintiff contends, that, although the mortgage-deed be void, yet Hodgson is entitled to recover, because he has paid money to the order of Butts, under the mistaken opinion that he was entitled to the freight.

This allegation is not made out in point of fact. Hodgson was in possession of the vessel as the absolute purchaser before he paid for the disbursements he is now endeavouring to recover. It does not appear that he paid these disbursements in the confidence of receiving the freight, or that he was not compellable to pay them as owner of the vessel. The freight had previously been applied by Butts, under the authority of the Hamiltons, to the payment of a debt due to himself. He had a right, as a general creditor, to retain that freight as against the original owners, or their assignee.

The court is of opinion, that the judgment of the circuit court is to be affirmed with costs.

UNITED STATES v. BENJAMIN MORE.*

ERROR to the circuit court of the district of Columbia, sitting at Washington, upon a judgment in favour of the traverser, on a demurrer to an indictment for taking unlawful fees as a justice of the peace for the county of Washington.

No appeal or writ of error lies *in a criminal case*, from the judgment of the circuit court, of the district of Columbia.

Quere, whether the act of congress, abolishing the fees of justices of the peace, in the district of Columbia, can affect those justices who were in commission when the act was passed?

The indictment was as follows, viz. "United States, District of Columbia and County of Washington, to wit,

"The jurors for the United States, for the district of Columbia, and county of Washington, aforesaid, upon their oath present, that Benjamin More, late of the county of Washington, aforesaid, gentleman, on the 10th day of December, in the year of our Lord one thousand eight hundred and two, then being one of the justices of the peace of the United States, for the county of Washington aforesaid, at the county of Washington aforesaid, by colour of his said office, unlawfully and unjustly did demand, extort, receive and take, of and from one Richard Spalding, constable, acting for and on behalf, of one Joseph Hickman, the sum of twelve cents, and a half cent, lawful current money of the United States, for and as his fee, for executing and doing the duties of his said office, to wit, for rendering and giving judgment upon a warrant for a small debt, in a case between the said Joseph Hickman, plaintiff, and one Joseph Dove, defendant, in contempt of the law, to the great damage of them, the said Richard Spalding, and Joseph Hickman, and against the peace and government of the United States.

"JOHN T. MASON, { *United States Attorney, for the district of Columbia.*"

* Present, *Marshall*, Ch. J. *Cushing*, *Paterson*, *Chase*, *Washington*, and *Johnson*, Justices.

THE UNITED STATES v. MORE.

To this indictment, there was a general demurrer and joinder, and judgment in the court below for the *traverser*, at July Term, 1803.*

* In the court below, the opinions of the judges were delivered to the following effect.

CRANCH, J. The question to be decided upon this demurrer is, whether the act of congress, for abolishing the fees of justices of the peace, in the district of Columbia, can affect those justices who were in commission before, and at the time when that act passed, and who accepted their commissions, while those fees were legally annexed to the office.

The points made in the argument of this cause, are important, and some of them, not altogether clear of doubt.

It has been contended, that congress, in legislating for the district of Columbia, are not bound by any of the prohibitions of the constitution.

But this is a doctrine to which I can never assent. Can it be said, that congress may pass a bill of *attainder* for the district of Columbia? That congress may pass laws *ex post facto* in the district, or order soldiers to be quartered upon us in a time of peace, or make our ports free ports of entry, or lay duties upon our exports, or take away the right of trial by jury, in criminal prosecutions?

Yet, all this they may do, if, in legislating for the district of Columbia, they are not restricted by the express prohibitions of the constitution. The words must be positive and strong indeed, to justify such a construction. The only clause from which such an inference can possibly seem to flow, is that which says, "congress shall have power to exercise *exclusive* legislation *in all cases whatsoever*, over such district," &c.

But the whole instrument is to be taken together, and every part is to be made consistent with the residue, if possible. That congress may legislate, "in all cases whatsoever, over such district," &c. is the general proposition, and the prohibitions are the exceptions. The true construction is, that congress may legislate for us, in all cases where they are not prohibited by other parts of the constitution. The express commands of the constitution operate as prohibitions of every thing repugnant to such commands. In every case, therefore, where congress are not bound, either by the commands or prohibitions of the constitution, they have a discretionary power to legislate over the district.

The constitution was made for the benefit of every citizen of the United States, and there is no such citizen, whatever may be his condition, or wherever he may be situated within the limits of the territory of the United States, who has not a right to the protection it affords.

Mason, attorney for the United States for the district of Columbia. The act of congress of *February* 27, 1801,

If congress are bound by the constitution in legislating for this district, then it becomes proper to test the validity of their legislative acts, respecting the district, by the provisions of the constitution.

The 3d article of the constitution, provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, *which shall not be diminished during their continuance in office.*

The act of congress, of 27th of February, 1801, which constitutes the office of justices of the peace, and empowers them to try personal demands, of the value of 20 dollars, ascertains the compensation which they shall have for their services in holding their courts, and trying those causes. This compensation is given in the form of fees, payable when the services are rendered. The causes of which they have cognizance, are causes arising under the laws of the United States, and, therefore, the power of trying them, is part of the judicial power mentioned in the 3d article of the constitution, which expressly declares, that the judicial power of the United States, shall extend to all cases arising under those laws.

It is difficult to conceive how a magistrate can lawfully sit in judgment, exercising judicial powers, and enforcing his judgments by process of law, without holding a court. I consider such a court, thus exercising a part of the judicial power of the United States, as an inferior court, and the justice of the peace as the judge of that court. It is unnecessary in this cause to decide the question, whether, as such, he holds his office during good behaviour; but that his compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution. It has been contended, that the compensation of a justice of the peace is not within this provision of the constitution, because the act of congress has not appointed the *stated times* at which it shall be paid. It is true, that the act of congress has not said that the compensation shall be paid on any particular day, and month; but it may, perhaps, be a compliance with the clause of the constitution, which requires that it shall be receivable at stated times, to say that it shall be paid when the service is rendered. And, we are rather to incline to this construction, than to suppose the command of the constitution to have been disobeyed.

If, therefore, the constitution of the United States is obligatory upon congress, when legislating for this district; if a justice of the peace is a judge of an inferior court of the United States; and, if his compensation has once been fixed by law, a subsequent law for diminishing that compensation (*a fortiori* for *abolishing* it) cannot affect that justice of the peace during his continuance in office;

THE UNITED STATES v. MORE.

§ 11, *vol. 5, p. 271*, declares, "that there shall be appointed in and for each of the said counties, (in the district of Co-

whatever effect it may have upon those justices who have been appointed to office since the passing of the act.

MARSHALL, J. concurred.

KILTY, Ch. J. This is an indictment at common law, against the defendant, a justice of the peace, for having, under colour of his office, exacted and taken an illegal fee, as therein described.

The demurrer admits his being a justice, and the exaction and receipt of the fee, and rests the defence on the legality of such conduct.

The legality of exacting and taking fees, under colour of a public office, must depend on the express authority of law, and, therefore, the question must turn upon the acts which have passed on this subject, as it respects the district of Columbia.

The justices of the peace were allowed expressly to receive *fees* for their services, by the act of February, 1801, section 11, and by the 4th section of the act of March, 1801, they were, as commissioners, entitled to certain *fees and emoluments*.

It is possible, that if the 11th section had only provided for the appointment of justices, without speaking of their fees, the 1st section, adopting the laws of the two states, might have had the effect of giving them the fees provided by the laws of Maryland. But an inquiry into this part of the subject is not important, because, as it has been observed in the course of the argument, so *much* of those two acts as provides for the compensation to the justices, is repealed by the act of May, 1802; and it is not material to determine by which of the sections the provision was made.

The act of 1802, section 8, having positively declared, that this provision was repealed, and having thereby left no power existing to demand the fees before allowed, it remains only to examine into the ground on which the latter act is alleged to be unconstitutional and void.

According to the course which has been pursued by the supreme court, it appears unnecessary to say any thing about the power of a court to examine into the constitutionality of a law, until a case has been made out to justify such an inquiry. But, taking the power for granted, we are to inquire how it is called for in the present instance.

In testing an act of the legislature by the constitution, nothing less than the positive provisions of the latter can be resorted to, and without absolute restriction by the constitution, the legislative power is omnipotent over subjects submitted to it. We must, therefore, reject the idea of judging this act on the principles of a contract, and setting it aside as an infraction of such contract.

lumbia) such number of discreet persons, to be justices of the peace, as the president of the United States shall, from time to time, think expedient, to continue in office five

In support of the position, that the act of May, 1802, is unconstitutional and void, the following arguments have been urged:

1. That a justice is a judicial officer.

2. That a justice is a court.

3. That a justice shall receive for his services a *compensation*, which shall not be diminished during his continuance in office; and that, therefore, taking away his fees, by repealing the act which gave them, is diminishing his compensation, and is contrary to the constitution.

The nature of some of the duties confided to a justice of the peace may make him a judicial officer; and he might even be admitted to be a court, without bringing him within the provisions of the constitution. The first section of the third article speaks of the judicial power of the *United States*. It declares what courts it shall be vested in, and then provides, that the judges of such courts shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

When we consider this instrument as constituting a general government, and defining, amongst others, its judicial power, we must take it in its most extensive sense, as applying to the whole of the United States, and not to a particular territory.

I consider, therefore, that the judicial power given to the traverser, as a justice of the peace, is not, in the sense of the constitution, the *judicial power of the United States*; and that such justice is not such a court as is provided for in the article and section in question. The justice does not, according to that article and section, hold his office during good behaviour; nor can the power of receiving certain fees, which was given by the act of 1801, be strained to mean "receiving at stated times a compensation for his services."

The second section of the third article declares what subjects the judicial power, given by the first section, shall extend to. And by comparing these subjects with those which are cognizable by the justice in the present case, it will confirm the position, that this judicial power is not that of the *United States*, and is not provided for by this part of the constitution.

Congress, in organising the judiciary according to the constitution, have created a supreme court, and inferior courts. Some of the latter extend over certain circuits composed of different states, and others are confined to the respective states; but in all of them, it is the judicial power of the United States which is carried into effect.

THE UNITED STATES v. MORE.

years. And such justices, having taken an oath for the faithful and impartial discharge of the duties of the office, shall, in all matters civil and criminal, and in whatever

I consider this judicial power as being different in its object and nature from that which may be the effect of the legislative power given to congress over this territory, or of their power to make rules, &c. for such places as may become their property.

In order to show that the restrictions contained in the first section of the third article of the constitution do not extend to a justice in the district of Columbia, it may be necessary to make some inquiry into the principles on which the district is erected.

Without endeavouring to solve all the difficulties which have been mentioned in the course of the argument, I am persuaded that the following positions are correct:—That the district of Columbia, though belonging to the United States, and within their compass, is not, like a state, a component part, and that the provisions of the constitution, which are applicable particularly to the relative situation of the United States and the several states, are not applicable to this district.

That the power of congress to legislate for the district arises from the positive direction of the constitution, in the 8th section of the first article; and it may be here material to attend to the words "*exclusive legislation*," and to discover their meaning and origin.

By the constitution, the legislative power of congress is confined to certain objects, and leaves to the several states a portion of the legislative power which they before possessed. But it was the intention of the framers of the constitution, to divest the ten miles square of the privileges of a state, and to give to congress the whole and exclusive power of legislation, as well on the subjects which had been left to the states, as on those which had been taken from them and given to the general government—That the ten miles square is not in a situation to become a state without an amendment in the constitution, and therein differs from the other territories belonging to the United States—That the word *exclusive* meaning only free from the power exercised by the several states, the legislative power to be exercised by congress may still be subject to the general restraints contained in the constitution, though it includes subjects both of a general and local nature. Thus they are restrained from suspending the writ of *habeas corpus*, unless in the cases allowed; from passing (within and for the district) a bill of attainder, or *ex post facto* law; from laying therein a capitation tax; from granting therein any title of nobility; from making therein a law respecting the establishment of religion, or abridging the freedom of speech, or of the press; and from quartering soldiers therein, contrary to the third amendment.

But when congress, in exercising exclusive legislation over this territory, enact laws to give or to take away the fees of the justices

relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of said district for which they shall have been respectively appointed; and they shall have cognizance in personal demands to the value of 20 dollars, exclusive of costs, which sum they shall not exceed, any law to the contrary notwithstanding; and they shall be entitled to receive for their services, the fees allowed for like services by the laws herein before adopted and continued in the eastern part of said district."

By the 4th section of the act of congress of *3d March*, 1801, *vol. 5, p.* 288, the magistrates are constituted a board of commissioners, with certain duties and fees annexed to that office. And by the act of 3d of *May*, 1802, *vol.* 6, *p.* 181, § 8, it is enacted, "that so much of two acts of congress, the one passed on the 27th of February, 1801, entitled, "An act concerning the district of Columbia," the other passed the 3d day of March, 1801, supplementary to the aforesaid act, as provides for the compensation to be made to certain justices of the peace thereby created," "shall be, and the same is hereby repealed." The question for the decision of this court is, whether congress had a constitutional right thus to abolish the fees.

Jones, contra. By the act of 1801, certain fees were annexed to the office of justice of the peace. The traverser was appointed under that act, and while the fees

of the peace, such laws cannot be tested by a provision in the constitution, evidently applicable to the judicial power of the whole United States, and containing restrictions which cannot, in their nature, affect the situation of the justices, or the nature of the compensation.

However ingeniously the question has been argued, I cannot feel any doubt in my mind on it. Nor can I perceive any legal or justifiable ground under which the direction of the act of 1802 has been disregarded. I am, therefore, of opinion, that the judgment on the demurrer should be for the United States.

But the judgment of the court is for the defendant.

THE UNITED STATES v. MORE.

were thus annexed.* The principle we contend for is, that he was a judge of an inferior court of the United States, and protected by the third article of the constitution, which declares, that "the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

A law for abolishing the fees can only affect those justices who have been appointed since the passage of that law.

It has been decided in this court, in the case of *Marbury* v. *Madison*, (*ante*, *vol.* 1, *p.* 162.) that a justice of the peace in the district of Columbia does not hold his office at the will of the president.

The power to make laws is expressly given; the power to repeal is not, but necessarily follows. So the power of appointment necessarily implies the power of removal, according to the maxim, *cujus est dare, ejus est disponere.* This principle was settled in congress in the year 1789, after long debate upon the tenure of office of secretary of state, and was expressed by means of a clause in the law directing what officer should take charge of the papers in that department, when the secretary of state *should be removed by the president.* Congress has no power to limit the tenure of any office to which the president is to appoint, unless in the case of a judge under the constitution. The position for which we contend is justified by principle. The jurisdiction given to a justice of the peace, makes him a judge of an inferior court. Lord Coke defines a court to be *a place where justice is judicially administered;* and this definition is recognised by Blackstone. Certain powers are incident to all courts, as to commit for contempts *in* court; for there is a difference between courts of record, and courts not of record, as to contempts *out* of court.

* This fact does not appear in the record, but it was agreed by the counsel on both sides, that the record should be so amended as to bring the whole merits of the cause before the court.

By the act of 1801, the justices of the peace are to have the same powers, in all matters, civil and criminal, as were exercised by the justices of the peace in Maryland. In resorting to the Maryland code of laws, we find a very early act of assembly, which gives to justices of the peace the power of punishing contempts in their presence. Indeed, they possess a vast accumulation of powers. They may inflict whipping, imprisonment, and fine as high as 500 pounds of tobacco. They have a much more extensive jurisdiction than many more regular courts. They have cognizance of civil controversies of the value of 20 dollars. They hold courts, they try causes, they give judgments, and issue executions. Every one who consults the index to the laws of Maryland, must be satisfied that the justices of the peace constitute very important tribunals, and it is immaterial by what name they are called; they administer justice judicially; they have, therefore, the power to hold a court. The traverser was appointed before the repeal. He had a compensation, which is taken away by the repeal. It is, therefore, so far unconstitutional. It is no objection that the tenure of office is limited to five years. It is not the tenure, but the essence and nature of the office which is to decide this question. If the limitation to five years makes a difference, it would be an evasion of the constitution. But it is of no consequence how congress have determined the tenure. It is established by the constitution.

Mason, in reply. The constitution does not apply to this case. The constitution is a compact between the people of the United States in their individual capacity, and the states in their political capacity.

Unfortunately for the citizens of Columbia, they are not in either of these capacities.

The 2d section of the third article of the constitution declares, that "the judicial power of the United States shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to

THE UNITED STATES v. MORE.

controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state and the citizens thereof, and foreign states, citizens or subjects."

The judicial power of the United States can only extend to the cases enumerated; but the judicial power exercised in the district of Columbia, extends to other cases, and, therefore, is not the judicial power of the United States. It is a power derived from the power given to congress to *legislate* exclusively in all cases whatsoever over the district. And it is under this clause of the constitution that congress have created justices of the peace and given them power. Congress are under *no controul* in legislating for the district of Columbia. Their power, in this respect, is *unlimited*. If congress cannot limit the tenure of the office, but it *must* be during good behaviour, then a law might be passed without the concurrence of the legislative will.

I understand the case of *Marbury* v. *Madison* to have decided only that the justices held during good behaviour for five years under the law; and not generally during good behaviour, under the constitution.

The general provisions of the constitution do not apply to our case. We are the people of *congress*. They are to legislate for us, and to their laws we *must submit*.

Jones. The executive power exercised within the district of Columbia is the executive power of the United States. The legislative power exercised in the district is the legislative power of the United States.—And what reason can be given why the judicial power exercised in the district should not be the judicial power of the United States? If it be not the judicial power of the United States, of what nation, state or political society is it the judicial power? All the officers in the district are officers of the United States.

By the 2d section of the third article of the constitution, the judicial power of the United States is to extend to all cases arising under the laws of the United States. All the laws in force in the district are laws of the United States, and no case can arise which is not to be decided by those laws. What judicial power is that which is exercised by the circuit court of the district? They certainly exercise a very respectable part of the judicial power of the United States. Was it ever contended, that congress could limit the tenure of the offices of the judges of that court? or that the judges were not liable to impeachment under the constitution?

February 13.

The *Chief Justice* suggested a doubt whether the appellate jurisdiction of this court extends to *criminal cases*.

February 22.

Mason, in support of the appellate jurisdiction of this court in criminal cases.

By the 1st section of the third article of the constitution, the judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish.

By the 2d section it is extended to all cases in *law* and equity arising under the laws of the United States. This is a case in *law* arising under the laws of the United States, and is, therefore, within that section.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. *In all the other cases before-mentioned*, the supreme court *shall have* appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations*, as the congress shall make."

THE UNITED STATES v. MORE.

Congress has made no exception of criminal cases. I understand it to have been said by this court, that it is necessary that congress should have made a *regulation* to enable this court to exercise its appellate jurisdiction. Upon this point I consider myself bound by the case of *Clarke* v. *Bazadone*, *ante*, *vol.* 1. *p.* 212. It is clear, then, that this court has the jurisdiction, and the only question is, whether congress has made such a *regulation* as will enable this court to exercise it.

Such a regulation is contained in the *14th section of the judiciary of* 1789, *vol.* 1. *p.* 58, 59, which enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The writ of error in a criminal case is a writ not provided for by statute, and necessary for the exercise of the appellate jurisdiction given to the supreme court by the constitution, and agreeable to the principles and usages of law. This court has, therefore, the power to issue it.

There is no reason why the writ of error should be confined to civil cases. A man's life, his liberty, and his good name, are as dear to him as his property; and inferior courts are as liable to err in one case as in the other. There is nothing in the nature of the cases which should make a difference; nor is it a novel doctrine that a writ of error should lie in a criminal case. They have been frequent in that country from which we have drawn almost all our forms of judicial proceedings.

It is true, that it is expressly given by the act of congress of 1789, in civil cases only, but it does not thence follow that it should be denied in criminal.

MARSHALL, Ch. J. If congress had erected inferior courts, without saying in what cases a writ of error or appeal should lie from such courts to this, your

argument would be irresistible; but when the constitution has given congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.

Mason. When legislating over the district of Columbia, congress are bound by no constitution. If they are, they have violated it by not giving us a republican form of government. The same observation will also apply to Louisiana.

The act of congress which gives a writ of error to the circuit court of this district, differs, in some respects, from that which gives the writ of error to the other courts of the United States.

The words of the judiciary act of 1789, section 22, are, "and upon a like process, (that is, by a writ of error, citation, &c.) may final judgments and decrees in *civil actions*, and suits in equity in a circuit court," &c. "be reversed or affirmed in the supreme court."

But in the law concerning the district of Columbia, § 8, *vol. 5, p.* 270, the expressions are, "that *any* final judgment, order, or decree in said court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States."

In this section, if the words respecting the value of the matter in dispute, were excluded, a writ of error would clearly lie in a criminal case, under the general expression, *any final judgment.* Then do those words respecting the value, exclude criminal cases? Suppose

THE UNITED STATES v. MORE.

the court below had imposed a fine of more than 100 dollars, the case would have been within the express words of the act. So it would have been, if a penalty of more than 100 dollars had been imposed by law.

But this court has exercised appellate jurisdiction in a criminal case, *United States* v. *Simms*, *ante*, *vol.* 1, *p.* 252.

MARSHALL, Ch. J. No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.

Mason. But the traverser had able counsel, who did not think proper to make the objection.

March 2.

MARSHALL, Ch. J.* delivered the opinion of the court as follows:

This is an indictment against the defendant, for taking fees, under colour of his office, as a justice of the peace in the district of Columbia.

A doubt has been suggested respecting the jurisdiction of this court, in appeals on writs of error, from the judgments of the circuit court for that district, in criminal cases; and this question is to be decided before the court can inquire into the merits of the case.

In support of the jurisdiction of the court, the attorney-general has adverted to the words of the constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of, "all cases in law and equity arising under the laws of the United States," and as the appellate jurisdiction of this court, was extended to all enumerated cases, other than those

* *Johnson*, Justice, was absent when this opinion was delivered.

which might be brought on originally, "with such exceptions, and under such regulations, as the congress shall make," that the supreme court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by congress, which should circumscribe the jurisdiction conferred by the constitution.

This argument would be unanswerable, if the supreme court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

Thus the appellate jurisdiction of this court, from the judgments of the circuit courts, is described affirmatively. No restrictive words are used. Yet it has never been supposed, that a decision of a circuit court could be reviewed, unless the matter in dispute should exceed the value of 2,000 dollars. There are no words in the act restraining the supreme court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the circuit court, where the matter in dispute exceeds the value of 2,000 dollars.

This court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which, is expressly given by law.

On examining the act, "concerning the district of Columbia," the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words, "matter in dispute," seem appropriated to civil cases, where the subject in contest has

THE UNITED STATES v. MORE.

a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of 100 dollars, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit.

The writ of error, therefore, is to be dismissed, this court having no jurisdiction of the case.*

FAW v. ROBERDEAU'S EXECUTOR.

FAW v. ROBERDEAU'S EXECUTOR.

If an act of limitations have a clause, "saving to all persons *non compos mentis, femes covert*, infants, imprisoned, or *out of the commonwealth*, three years after their several disabilities removed," a creditor, resident of another state, removes his disability by *coming into the commonwealth*, even for temporary purposes; provided the debtor be at that time within the commonwealth.

THIS was an action in the circuit court of the district of Columbia, for the county of Alexandria; and the question arose upon the construction of the act of assembly of Virginia, for "reducing into one, the several acts concerning wills," &c. *Revised Code*, *p.* 169, *c.* 92, § 56, which is in these words, viz. "If any suit shall be brought against any executor, or adminstrator, for the recovery of a debt due upon an open account, it shall be the duty of the court, before whom such suit shall be brought, to cause to be expunged from such account, every item thereof, which shall appear to have been due five years before the death of the testator, or intestate. Saving to all persons *non compos mentis*, *femes covert*, infants imprisoned, or *out of this commonwealth*, who may be plaintiffs in such suits *three years after their several disabilities removed.*"

The declaration was for plank, scantling, and foundation-stone, lent by the plaintiff to the defendant.

* See the case of the *United States* v. *La Vengeance*, 3 *Dall.* 297, where it seems to be admitted, that in criminal cases the judgment of the inferior court is final.

For the like materials, sold and delivered, and for money had and received. The defendant pleaded the general issue, and a verdict was taken for the plaintiff, subject to the opinion of the court, upon the following facts:

"That the debt found by the verdict was due by the defendant's testator, to the plaintiff, in the year 1786. That the testator died in 1794. The plaintiff was a resident of, and in the state of Maryland, and out of the commonwealth of Virginia, when the articles were delivered for which the suit was brought, and when the debt was contracted; and continued so in Maryland, and out of the said commonwealth, until the month of June, 1795, when he removed to Alexandria to live, and hath lived there ever since. That in the year 1786, after the cause of action accrued, the plaintiff passed through the town of Alexandria, and was for a short time therein, but not as a resident thereof."

Upon this statement of facts, the judgment of the court below was for the defendant; and the plaintiff brought the present writ of error.

E. J. Lee, for plaintiff in error. The plaintiff was not a citizen of Virginia, when the debt was contracted. It does not appear that he did not commence his action within the limited time, after his becoming a citizen.

WASHINGTON, J. Does it not appear that Faw was in Virgima after the cause of action accrued?

E. J. Lee. Only as a traveller. It does not appear that the testator lived in Virginia at that time. The plaintiff had three years to bring his action, after removal into Virginia. The writ is no part of the record, unless made so by a bill of exceptions, and it is not stated when the action was brought.

Swann, contra. The act of limitation begins to run from the time the plaintiff passed through Alexandria, after the cause of action had accrued. His *disability*

FAW v. ROBERDEAU'S EXECUTOR.

(according to the expression of the act of assembly) was then removed, and he ought to have brought his action within three years from that time.

The plaintiff came to reside in Alexandria, in 1795. The suit was tried in 1802; hence the presumption is, that it was commenced at that time, and the plaintiff can only show the contrary by producing his writ. The state of the case negatives the idea of a loan. The claim, therefore, was upon the open account, and the court had a right to expunge all the articles charged five years before the death of the testator.

MARSHALL, Ch. J. That act has nothing to do with the lapse of time, after the death of the testator. The *five* years, are before his death. The *three* years, are also three years during the life of the testator, and the plaintiff must, therefore, have been in the state three years, during the life of Roberdeau, to make the limitation attach to his claim.

The court will hear you upon that point, if you think this opinion not correct.

Swann said, that no objection occurred to him at present.

MARSHALL, Ch. J. The court is satisfied with that opinion, unless you can gainsay it.

WASHINGTON, J. There is another point. Did not the plaintiff's coming into the state in 1786, after the cause of action accrued, cause the limitation to attach?

Swann. The words of the act are, "saving to persons *out of this commonwealth*," not persons *residing* out of this commonwealth. *Being* "*out* of the commonwealth," is the disability; *coming into* the commonwealth, therefore, is a removal of that disability. If the saving had been to persons *residing* out, &c. then, possibly, a mere *coming in, without residing*, would not have been a removal of the disability. 3 *Wilson*, 145, *Strithorst* v. *Græme.*

E. J. Lee. Under the British *Stat. of* 1 *James*, *c.* 16, § 3, the plaintiff must have been a resident in England; and he then has six years after his *return*. Here the plaintiff was not a resident of Virginia at any time during the life of the testator. 4 *T. R.* 516, *Perry* v. *Jackson*.

MARSHALL, Ch, J. Beyond sea, and out of the state, are analogous expressions, and are to have the same construction.

The whole case turns upon the question, whether the plaintiff's being in the state, in 1786, after the cause of action had accrued, takes him out of the saving clause.*

E. J. Lee. The casual coming into the state, is not within the meaning of the act. It means the coming in to reside. The "act for the limitation of actions," &c. *Revised Code*, *p.* 116, § 18, speaks of persons *residing* beyond seas, or out of the country. If, in such case, the plaintiff has a factor in this country, the statute runs against him; but if no factor, then it does not.

Suppose the plaintiffs should be foreign partners, and one of them should be driven by stress of weather into a remote part of the state, he may be ignorant of the place of residence of his debtor. Shall the plaintiffs, in such case, be barred by the act of limitation?

The case in 2 *W. Bl.* 723, turned upon the question of *residence*. I can find no positive authority. I believe the point has never been expresaly decided.

March 2.

MARSHALL, Ch. J. after stating the case, delivered the opinion of the court. There being a general verdict for the plaintiff, it is necessary, in order to justify a judgment for the defendant, that the statement of facts, upon which he relies, should contain all the circumstances ne-

* See the case of *Dureure* v. *Jones*, 4 *T. R.* 300, which seems decisive as to that point.

FAW v. ROBERDEAU'S EXECUTOR.

cessary to support such a judgment; otherwise the judgment must be rendered upon the verdict for the plaintiff.

The five years mentioned in the 56th section of the act of assembly, must have elapsed before the death of the testator. If they did not, no lapse of time after his death can bring the case within the purview of this act. In the present case, the five years had elapsed. But there is a saving clause, in the following words: "Saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed."

It is one of the facts stated, that the plaintiff was within the commonwealth of Virginia, in the year 1786, after the cause of action accrued: and hence it is argued, that he is not within the saving clause of the section, and that, to exclude him from the benefit of that clause, it is not necessary that he should have become a resident of that state.

The court has not been able to find any case in which this question has been decided. We are, therefore, obliged to form an opinion from a consideration of the act itself.

The words of the act are, "*out of this commonwealth*," and such persons may bring their actions within three years after their "*disability*" removed.

The court is of opinion, that the disability is removed at the moment when the person comes into the commonwealth; and he must bring his action within three years from that time.

But something further than this was necessary to authorise a judgment for the defendant. It ought to have appeared, that Roberdeau was a resident of the state of Virginia at the time the plaintiff came into that state in 1786; and that fact is not in the case stated. The judgment, therefore, ought to have been for the plaintiff, and not for the defendant.

Judgment reversed, with costs, and judgment entered for the plaintiff on the verdict.

RAY *v.* LAW.

A decree for a sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal will lie.

LAW having a mortgage on real estate in the city of Washington, and Ray having a subsequent mortgage on the same estate, Law had filed his bill in chancery in the circuit court of the district of Columbia, for a foreclosure and sale of the mortgaged property, and made Ray a defendant. The bill having been taken for confessed against Ray, a decree was obtained by Law for a sale. The sale had been made under the decree, and notice given, that on a certain day the sale would be ratified unless cause was shown. On that day Ray appeared; but not showing good cause, in the opinion of the court, the sale was confirmed. Ray prayed an appeal to this court on the decree for the sale, which the court refused, on the ground, as it is understood, that the decree for the sale was not a *final* decree in the cause.

Ray on this day presented a petition to this court setting forth those facts, among others, praying relief, and that this court would direct the court below to send up the record. At the same time he produced sundry papers, purporting to be the substance of that record, but not properly authenticated.

MARSHALL, Ch. J. The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorises an appeal or writ of error on a *final* judgment or decree.

C. Lee, for the petitioner, contended, that this was a final decree as to Ray, and cited 2 *Fowler's Exchequer Practice*, 195, to show, that such a decree would, in England, be considered such a *final* decree as would authorise an appeal.

March 5.

MARSHALL, Ch. J. We can do nothing without seeing the record, and the papers offered cannot be considered by us as a record.

RAY v. LAW.

The court, however, is of opinion, that a decree for a sale under a mortgage, is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies.

LEVY v. GADSBY.

LEVY v. GADSBY.

If *A* lend money to *B*, who puts it out at usurious interest, and agrees to pay to *A* the same rate of interest which he is receiving upon *A's* money, this is usury between *A* and *B*, and an indorsor of *B's* note to *A*, may avail himself of the plea of usury.

If the usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria.

This was an action of *assumpsit*, by Levy, the indorsee of a promissory note, against Gadsby, payee and indorsor of M'Intosh's note.

The declaration consisted of three counts. The 1st, in addition to the common averments, alleged, that the plaintiff had brought suit upon the note against M'Intosh, in Maryland, and recovered judgment, but that before execution made M'Intosh died insolvent. The 2d *count* was in the usual form, excepting that it alleged that Gadsby, became liable by the *custom of merchants*. The 3d *count* was for money had and received. The defendant pleaded, 1st. *Non assumpsit*. 2d. As to the first count, usury between M'Intosh and Levy, stating the transaction as a loan, by the latter to the former. 3d. As to the first count, usury between the same parties, stating the transaction as a forbearance of an antecedent debt. The 4th and 5th were like pleas of usury to the 2d count. The 3d and 5th pleas, by mistake, alleged the note given, in pursuance of the corrupt agreement, to be a note made by Gadsby to M'Intosh, and by him indorsed to Levy; whereas, the note in the declaration mentioned, was a note made by M'Intosh to Gadsby, and *by him* indorsed to Levy. To the pleas of usury, there were general replications and issues, and a general verdict for the defendant. On

the trial three bills of exception were taken by the plaintiff.

The court has the exclusive power of deciding whether a written contract be usurious.

1st. The first stated, that the plaintiff gave in evidence, a promissory note in the usual form, dated November 1, 1797, whereby M'Intosh, six months after date, promised to pay to Gadsby, or order, 1,436 dollars, 62 cents, for value received, negotiable at the bank of Alexandria. And it was proved that Levy and M'Intosh carried on trade and commerce in copartnership, under the name and firm of Levy and M'Intosh, at Alexandria, Levy residing at Georgetown, about 8 miles distant from Alexandria. That they so continued to carry on trade and commerce from sometime in the year 1796, till the 12th day of November, 1797, on which day the partnership was dissolved; and that the dissolution was advertised in the public papers, on the 19th of October, 1797, to take place on the said 12th day of November, 1797. And the defendant, to support the issues on his part, offered in evidence, a paper in the hand-writing of the plaintiff, and by him subscribed, as follows:

"Georgetown, November 9th, 1797. Received of Mr. John M'Intosh, his two notes, one payable to John Gadsby for fourteen hundred and thirty-six dollars, sixty-two cents, dated the first instant, negotiable at the bank of Alexandria, at six months after date, indorsed by said Gadsby; the other to Thomas J. Beatty, of same date, at three months after date, for twelve hundred and seventy dollars, eighty-seven cents, negotiable at the bank of Columbia, and indorsed by said Beatty. The two notes making the sum of two thousand seven hundred and seven dollars, forty-nine cents, which, when paid, is on account of money due me from the firm of Levy and M'Intosh, equal to two thousand two hundred and ten dollars, twenty-four cents, as by their account, handed me by said M'Intosh, dated October 23d, 1797; and as the said M'Intosh agrees, he is receiving an interest equal to the difference, twixt the sum due me, as per their account current, and the notes payable, he, therefore, allows me the same interest as the one he is receiving for my money. Therefore, on a settlement of accounts, I am

LEVY v. GADSBY.

only to stand debited for twenty-two hundred and ten dollars, twenty-four cents, $2,210 24 due as per account current; $497 25 interest; $2,707 49.

N. LEVY."

The plaintiff's counsel objected to the said writing being given in evidence by the defendant, on the pleas of usury, and the court refused to permit it to go in evidence on those pleas. The plaintiff's counsel then objected to its going in evidence on the general issue of *non assumpsit*, but upon that issue, the court admitted it.

2d. The 2d bill of exceptions, after repeating the same facts, states, that the plaintiff's counsel prayed the opinion of the court, and their instruction to the jury, whether the circumstances given in evidence as aforesaid, amounted to proof of an usurious contract between Levy and M'Intosh; and the court, thereupon, instructed the jury, that those circumstances did amount to proof of an usurious contract between those parties.

3d. The 3d bill of exceptions was to the opinion of the court, that the agreement mentioned in the receipt given by Levy to M'Intosh, having been read in evidence, and having been, by the court, declared an usurious agreement, the note given in pursuance thereof, is void, and that the plaintiff is not entitled to recover thereon, against the defendant, in the present action.

Swann and *Simms*, for plaintiff in error. *C. Lee*, *Mason*, and *Jones*, for defendant.

The questions arising in this case are,

1st. Whether the court below was correct in instructing the jury, that the agreement contained in Levy's receipt, was usurious.

2d. Whether that receipt was admissible in evidence upon the issue of *non assumpsit*; and

3d. Whether it was admissible upon either of the other issues.

Swann, for plaintiff in error. 1. As to the usury. The court below undertook to say, that the agreement and other circumstances, amounted to conclusive proof of usury, when it ought to have been left to the jury, under all the circumstances of the case, to say whether the contract was usurious or not.

There appears to have been a partnership in usury, between Levy and M'Intosh. During that partnership, M'Intosh had loaned Levy's money at usury, and on the 23d of October, 1797, was indebted to Levy in the sum of 2,210 dollars, 24 cents, for money thus lent out at 3 and 6 months. And being satisfied that he should receive that money at those periods, he was willing to bind himself absolutely to pay it over to Levy, whose money it in truth was. This, we say, is the true construction of the receipt. It is no more than the case of an agent binding himself to pay over, at a particular time, the money of his principal, which shall at that time be in his hands.

To constitute usury under the act of assembly, *Revised Code of Virginia, p. 37* there must be either a *loan* of money, or forbearance of a *debt* already due. In this case there was neither a *loan* from Levy to M'Intosh, nor a debt due from M'Intosh to Levy. *Cowper*, 115, *Floyer* v. *Edwards*. A note given without consideration is not usurious. M'Intosh was to receive the money at a certain time, and pay it over to Levy. This is the whole of the contract. He only bound himself expressly to do what, in equity and conscience, he ought to do. At the time the notes were given, if Levy had sued M'Intosh for the money, it would have been a sufficient answer to say that M'Intosh had not received it.

If I authorise a man to lend 1,000 dollars of my money on usury for my benefit, and he does so, and has received 500 dollars for such usury, can I not compel him to pay it over to me? This is really the only question upon the merits of this case; and this seems to be decided by the case of *Faikney* v. *Reynous*, 4 *Burr.* 2069, and that of *Petrie* v. *Hannay*, 8 *T. R.* 418, in which it was held that if two be engaged in a transaction illegal, but not *malum in se*, and one of them pay the whole money, he

LEVY v. GADSBY.

may recover a proportion from the other, if this other has expressly promised to pay it. From hence it may be inferred, that although the original transaction between M'Intosh and the person to whom he lent the money on usury was illegal, and although Levy knew all the circumstances, and assented to the transaction, yet, inasmuch as it was not *malum in se*, and M'Intosh agreed to pay over the money to Levy when received, the illegality of the original transaction shall not discharge M'Intosh from such agreement, or render it void.

Simms, on the same side. An objection was made in the court below, to allowing usury to be given in evidence on the plea of *non assumpsit*, but it was overruled by the court. If there had been no other plea, perhaps the question would be doubtful; but when the defendant has pleaded usury in a particular way, he ought not to be permitted to resort to a different kind of usury. *Tate* v. *Wellings*, 3 *T. R.* 538. It tends to surprise and entrap the plaintiff.

C. Lee, contra.

1st. Whether usury can be given in evidence on *non assumpsit*.

Every thing which goes to show that the contract is void, may be given in evidence on that plea; for if the promise was void when made, then, in law, it was no promise. *Str.* 498, *Bernard* v. *Saul.* 2 *Str.* 733, *Burrows* v. *Jemino.* 1 *Esp. Rep.* 178.

There being two special pleas of usury makes no difference, the court having been of opinion that the evidence did not support those pleas.

2d. As to the construction of the agreement. If the usury is reserved for forbearance of a debt already due, it is the same thing as if reserved on an original loan. 1 *Call*, 74, 81, *Gibson* v. *Fristoe.* And it makes no difference whether the usurious interest is stated to be received from others or not. Usury is not to be covered by such devises as that. It is only an indirect way of receiving the usury.

No argument can make the transaction plainer, than it is stated in the receipt itself. *Res ipsa loquitur.*

Mason, on the same side. There can be no ground for the plaintiff to allege surprise in the admission of the receipt as evidence on the general issue. The special pleas set forth precisely the same facts, and nothing but a blunder in copying the pleas, and inserting the name of M'Intosh for Gadsby, prevented the evidence from being admitted on those pleas.

The agreement is, that as M'Intosh is receiving usury from others, therefore he will pay it to the plaintiff. If the debtor receives usury from *his* debtors, it is no justification of the creditor in demanding from him.

There is no evidence that the partnership of Levy and M'Intosh was a partnership in usury.

The receipt does not directly aver that M'Intosh is receiving the rate of interest mentioned. It only states that he *agrees* he is receiving it. A man may *agree* to a false statement of facts; and, indeed, that is always the case, when usury is attempted to be covered.

Jones, on the same side. The evidence offered was not only applicable to the general issue, but to the first special plea of usury. The agreement shows it to be a *loan* in the sense of the statute.

No precedent can be found of a plea of usury which does not state it as a loan.

The cases cited do not apply. The agreement itself does not state it to be accounting for profits received. But M'Intosh gives an absolute note for the payment of money, although it is agreed that it is outstanding.

The question is upon a written agreement, and the construction of all such agreements is exclusively with the court.

LEVY v. GADSBY.

March 4.

MARSHALL, Ch. J. delivered the opinion of the court.

It was slightly contended by the counsel for the plaintiff in error, that when usury has been specially pleaded, and the evidence adduced to support such plea has been adjudged by the court to be inapplicable to the facts so pleaded, the same evidence cannot be admitted upon the plea of *non assumpsit*. No cases in support of this position have been cited, and it does not appear to be supported by reasoning from analogy. In cases where there are special and general counts in a declaration, and the evidence does not support the special counts, the plaintiff is allowed to apply the same evidence in support of the general counts. On a parity of reasoning, the defendant should be permitted to give in evidence upon the plea of *non assumpsit*, the same facts which were adjudged inapplicable to the special pleas, but which might have been received on the general plea, if the special pleas had not been pleaded.

The counsel for the plaintiff has also contended, that although the paper-writing produced would, on the face of it, import a usurious contract, yet, as the jury might possibly have inferred from it certain extrinsic facts, which would have shown the contract not to have been within the act, the jury ought to have been left at liberty to infer those facts. But in this case the question arises upon a written instrument, and no principle is more clearly settled, than that the construction of a written evidence is exclusively with the court.

This court is of opinion, that the court below has correctly construed the instrument upon which the question arose, and that, therefore, there is no error in the judgment.

Judgment affirmed, with costs.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA v. WILSON.*

THIS was an action of covenant in the circuit court of the district of Columbia, sitting at Alexandria, brought by Wilson, the defendant in error, against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brig George, from Alexandria to Havre-de-Grace, &c.

If a policy upon a vessel have a clause, "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors, that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters.

Quere, whether such *report*, even if it related to the commencement of the voyage, would be conclusive evidence?

One of the clauses in the policy was in the following words, viz. "If the above vessel, after a regular survey, shall be condemned for being unsound or rotten, the underwriters shall not be bound to pay the subscription on this policy." The declaration was for a total loss, and averred, that the brig sailed from Alexandria, on the 24th of October, 1802, upon the voyage insured.

The defendants pleaded,

1st. "That on the 24th day of October, 1802, the said brigantine, called the George, was unsound in her timbers, and by reason of the said unsoundness, was not capable of performing the voyage in the policy mentioned, viz. at and from Alexandria aforesaid, across the Atlantic ocean to Havre-de-Grace, Rotterdam or Bremen, with liberty to call at Falmouth for orders, and this they are ready to verify," &c.

2d. "That after the said brigantine had gone from Alexandria aforesaid, upon the voyage aforesaid, and while she was proceeding upon the voyage aforesaid, upon the high seas, she sprung aleak, viz. on the 31st day of October, in the year aforesaid, in consequence of her not having been tight, staunch and strong enough for performing the voyage aforesaid, on the said 24th day of

* Present, *Marshall*, Ch. J. *Cushing*, *Paterson*, and *Washington*, Justices.

MA. IN. CO. OF ALEXANDRIA. v. WILSON.

October, in the year aforesaid, at Alexandria aforesaid, and, at the instance of her crew, her voyage was interrupted upon account of her incapacity to perform the same. And the said brigantine was put back and conducted into a convenient port to be examined and repaired, viz. into Norfolk in Virginia, and that a regular survey of the said brigantine was made at Norfolk on the day of in the year and thereupon the said brigantine was condemned for being unsound to that degree as not to be worthy of being repaired, and rendered fit and able to perform the voyage aforesaid, whereof the plaintiff afterwards, to wit, on the day and year last mentioned, at the county of Alexandria aforesaid, had notice, and this they are ready to verify," &c.

To this last plea there was, at first, a general demurrer, which was afterwards withdrawn, and general replications and issues to both pleas.

On the trial, two bills of exception were taken by the defendants. The first states, that the defendants moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony that the George, on the 24th of October, 1802, after a regular survey, *was condemned* as being unsound or rotten by the surveyors, whose report is as follows, to wit, "The brig George, of Alexandria, Caspar Hayman, master, having put into this port in distress, we, the subscribers, at the request of said master, did this day attend on board, for the purpose of ascertaining and reporting the situation of the said vessel, and the circumstances of said distress. We found, from the report of said master, and others, that they sailed from Alexandria on the 24th of October last past, with a cargo of tobacco, coffee and staves, bound on a voyage to Falmouth, in England; that on the 31st of the same month, in consequence of having met with heavy gales of wind, the vessel sprung aleak, and that with much difficulty and continued labour at the pumps, having seldom less than three feet water in the hold, they gained this port. Considering the foregoing circumstances, and the appearances which, in our minds, confirm the same, we think proper to recommend that the vessel be hauled to some convenient wharf, the

cargo landed, and the hull carefully examined. Given under our hands at Norfolk, Virginia, 17th November, 1802.

James Hunter,
Paul Proby."

"The cargo of the brig George, of Alexandria, having been unladen, pursuant to a recommendation contained in a report, dated the 17th instant, and signed by two of the present subscribers, we, the undersigned, at the request of Caspar Hayman, master of said brig, did this day attend on board for the purpose expressed in said report.

"We find, on a minute examination of the hull of said vessel, that without going into an extensive repair, the intended voyage cannot be prosecuted; and, considering the heavy expense that must necessarily attend such a measure, and which, in our opinion, would exceed the value of the vessel when completed, we are clearly of opinion, that the vessel and materials, in their present state, should be immediately sold on account of those concerned. Given under our hands at Norfolk, Virginia, this 26th Nov. 1802.

James Hunter, *Merchant*,
Paul Proby, *Ship-master*,
John Jarvis, } *Master Car-*
Thos. Nash, } *penters.*"

But the court refused to give the instruction as prayed.

The second bill of exceptions stated, that the defendants' counsel moved the court to instruct the jury to find a verdict for the defendants, if they should be satisfied by the testimony, that the brig George, after a regular survey, was condemned as having been unsound or rotten on the 24th day of October, 1802, by the surveyors, whose report is as follows: (here was inserted the same report) and shall also be satisfied by the evidence, that the said vessel, while she was performing the voyage insured upon the high seas, sprung aleak on the 31st day of October, in the year aforesaid, and at the instance of her crew, the said voyage was interrupted

MA. IN. CO. OF ALEXANDRIA v. WILSON.

upon account of her incapacity to perform the said voyage; and that the said brigantine was put back, and conducted into a convenient port to be examined, namely, into Norfolk in Virginia, where the survey herein before-mentioned, was made; but the court refused to give such instruction.

C. Lee, for plaintiffs in error. Three points arise in this cause.

1st. That the report of the surveyors is conclusive upon the question of seaworthiness, unless partiality, corruption, or misbehaviour on the part of the surveyors, in making the survey, can be shown.

2d. That it is competent for the defendant to explain, by parol testimony, the grounds upon which the surveyors condemned the vessel.

3d. That it was not necessary for the insurers to plead specially the report of the surveyors, and their condemnation of the vessel, but that it might be given in evidence.

1st. If the parties have agreed upon a tribunal to decide a particular question, they must be bound by the decision of that tribunal. So in the case of an award. It is binding upon the parties all over the world.

But, it may be said, how are the surveyors to ascertain the condition of the vessel on the 24th of October? The answer is, that they might examine witnesses; they might judge from the universal decay of the timbers, &c.

The covenant in the policy does not say at what time the vessel must be proved to have been unsound. But we admit, that she must be proved to have been unsound at the time the voyage commenced.

We pleaded, that she was unsound on the 24th of October, when the voyage commenced; and we prayed the court to instruct the jury, that if they should be satisfied by the evidence that she was *condemned*

as being unsound and rotten on the 24th of October, after a regular survey, they ought to find a verdict for the defendants. This instruction, we contend, the court ought to have given; for the report of the surveyors is like an award of arbitrators, which cannot be set aside, unless partiality, fraud, or misbehaviour be proved on the part of the arbitrators. In the case of *Shelton* v. *Barbour*, 2 *Wash.* 64, it was held, that a former verdict and judgment between the mother of the plaintiff, who sued for his freedom, and the defendant, by which it was adjudged that the mother was a slave, were conclusive evidence that the plaintiff, her son, was a slave. And this was in a question where freedom was concerned, and where the natural leaning of the court is presumed to be in favour of freedom.

The judgment of a court is to be admitted as conclusive evidence, without being specially pleaded. So is an award, and the judgment of a foreign court which has jurisdiction over the subject matter and the parties.

2d. If the report of the surveyors does not refer to the 24th of October, as the time when the vessel was unsound, it was competent for us to explain the report by testimony not inconsistent with it. There is, however, enough in the report to induce a presumption that she was not sound on the 24th. The unsoundness was in the *hull*, not in the rigging, masts, &c.

To show that parol testimony might be admitted to explain any ambiguity of the report, the following cases were cited: 1. *T. R.* 701, *Doe, dem. Freeland* v. *Burt.* 1 *Dall.* 193, *Gregory* v. *Setter.* 2 *Dall.* 171, *Field* v. *Briddle.* 2 *Dall.* 173, *M'Minn* v. *Owen.* 1. *Wash.* 15, *Ross* v. *Norvell.*

March 5.

Marshall, Ch. J. declined giving an opinion, conceiving himself to be in a remote degree interested in the stock of the insurance company.

MAR. IN. CO. OF ALEXANDRIA v. WILSON.

The other three judges delivered their opinions *seriatim*, as follows:

WASHINGTON, J. It does not appear upon the record that any other evidence was offered to prove the vessel unsound on the 24th of October, than the report of the surveyors. No parol testimony appears to have been offered to explain the report, or to apply it to the time of commencing the risk. The bill of exceptions is repugnant. It asks an opinion predicated upon the unsoundness of the vessel on the 24th of October, and relies upon the report of the surveyors, which applies only to the 31st of October. If it was intended to bring before this court the propriety of admitting parol evidence to explain the report, that question does not appear to arise from the record.

I see no reason for reversing the judgment.

I do not, however, mean to be understood, that if parol evidence had been offered, it would have been proper to receive it. I give no opinion upon that point.

PATERSON, J. No parol evidence appears upon the record to show that the report of the surveyors referred to the 24th of October. The conclusiveness of the report, therefore, did not come before the court. It is not a point in the cause.

CUSHING, J. This is an action on a policy of insurance. The defence set up is, that the vessel was unsound and rotten on the 24th of October, when the risk commenced; and it is alleged that the report of the surveyors is conclusive evidence of that fact. But the report does not apply to that time. Let the judgment be affirmed with costs.

WILSON v. CODMAN'S EXECUTOR.*

ERROR from the circuit court of the district of Columbia, sitting at Alexandria.

In a declaration, the averment that the assignment of a promissory note was *for value received*, is an immaterial averment, and need not be proved. If the defendant plead the bankruptcy of the indorsor in bar, a replication stating that the note was given to the indorsor, *in trust for the plaintiff*, is not a departure from the declaration which alleges the note to have been given by the defendant for value received.

Claims against the agent cannot be offset against the principal.

Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance. But he may insist on the produc-

It was an action of debt originally brought by John Codman, as assignee of a promissory note made by the defendant, Wilson, to Andrew and William Ramsay.† The declaration was as follows, viz. "John Codman, assignee of Andrew Ramsay and William Ramsay, complains of William Wilson, in custody, &c. of a plea that he render unto him the sum of 1,038 dollars and 80 cents, which to him he owes, and from him unjustly detains, &c. for this, to wit, that whereas the said defendant on the 26th day of June, 1799, at Alexandria, in the county aforesaid, by his certain note in writing, subscribed with his proper hand and name, and to the court now here produced, the date whereof, &c. did promise to pay to the said Andrew and William Ramsay, or order, forty-five days after date, 1,038 dollars and 80 cents, for value received, negotiable in the bank of Alexandria; and the said Andrew and William Ramsay, afterwards, to wit, on the 23d day of October, in the year of our Lord 1802, at the county aforesaid, by their certain writing indorsed on the said note, and subscribed with their proper hands and names, *assigned the said note to the said plaintiff, for value received*, of which assignment the said defendant afterwards, to wit, &c. had notice; by means whereof, and by force of the act of assembly of Virginia, in such case made and provided, before the year 1801, action accrued," &c. There was an office-judgment against the defendant and his appearance-bail,

* Present, *Marshall*, Ch. J. *Cushing*, *Paterson* and *Washington*, Justices.

† An act of assembly of Virginia authorises an assignee of a promissory note to maintain an action of debt in his own name, against the maker of the note.

WILSON v. CODMAN'S EXECUTOR.

to set aside which, the latter pleaded *nil debet* for his principal, at June term, 1803.

At December term, 1803, the suit was entered abated by the plaintiff's death. Afterwards, at the same term, on the motion of Stephen Codman, by his attorney, it was ordered, "that the said Stephen Codman, *executor* of John Codman, deceased, be made plaintiff in this suit, with leave to prosecute the same."

tion of the letters testamentary, before the executor shall be permitted to prosecute.

At June term, 1804, the defendant gave special bail, and "moved the court for a rule upon the plaintiff to grant *oyer* of his letters testamentary, to enable the defendant to answer the plaintiff, which was opposed by the plaintiff's attorney, and the motion was refused by the court," whereupon the defendant took a bill of exceptions. The plea put in by the appearance-bail for the principal, was withdrawn, and the latter pleaded, 1st, *nil debet*, upon which issue was found, and, 2d, that before the 23d day of October, 1802, the time stated in the declaration, when A. and W. Ramsay are supposed to have assigned the said note to the said John Codman, the said A. and W. Ramsay had been declared bankrupts, &c. and on the day of March, 1802, had duly obtained their final discharge, &c. To this plea the plaintiff replied, that on the 20th of June, 1799, the defendant was justly indebted to John Codman, the testator, in the sum of 1,038 dollars and 80 cents, and in consideration thereof, on that day made and executed the promissory note in the declaration mentioned, for that sum, to A. and W. Ramsay, *as the agents of, and in trust for the use of, the said John Codman, the testator;* and concluded with a verification. To this replication the defendant demurred specially; 1st. Because it is a departure from, and is inconsistent with, the declaration, in this, that the declaration affirms, that the said note was payable to Andrew and William Ramsay, for value received, and was by them assigned, for value received, to the said John Codman; and the replication affirms, that the said note was executed and delivered to the said A. and W. Ramsay, as the agents of, and in trust for the use of, the said John Codman. 2d. Because the plaintiff, in his replication, ought to

have traversed the plea, and tendered an issue thereupon, and ought not to have replied the said special matter, and concluded with a verification. 3d. Because the said replication is informal and insufficient, &c.

Upon this demurrer the court below adjudged the issue in law for the plaintiff.

Upon the issue in fact, the jury found a verdict also for the plaintiff; and on the trial four bills of exception were taken by the defendant. The 1st was to the refusal of the court to instruct the jury, that the plaintiff ought to produce in evidence his letters testamentary, to enable him to maintain the issue on his part.

The 2d bill of exceptions stated, "that the defendant produced testimony to the following facts: viz. that A. and W. Ramsay, on the 13th of August, 1799, when the note in the declaration mentioned became due, were indebted to him on their own account in a large sum of money, to wit, in the sum of 8,000 dollars, and continued indebted to him always thereafter, to that or a greater amount, until they became bankrupt, in November, 1801. That they had taken the said note for the use and benefit of John Codman, and not for their own, and were authorised, as his agents, to receive payment of the said note for his use, from the date thereof, until the day of May, 1800. That the said John Codman urged payment to be made; and during this period of time, sundry payments in money were made to the said A. and W. Ramsay, by the defendant, who, at the time of making such payments, did not mention any definite purpose or use for which they were made. That the said Andrew and William Ramsay, during the period aforesaid, viz. from the 13th August, 1799, to the time of their bankruptcy, had authority to receive no other debt from the said William Wilson, except the debt due on the note aforesaid, and on another note for about the same sum, due for the use of said John Codman. And the defendant moved the court to direct the jury, that if they shall be of opinion, that at the times respectively when William Wilson, the defendant, made payments in money to

WILSON v. CODMAN'S EXECUTOR.

Andrew and William Ramsay, of sundry sums, after the note became due upon which this action is brought, they, the said A. and W. Ramsay, were indebted to him on their own account, always after the said note became due, to an amount exceeding 8,000 dollars, and were not authorised, during the whole of the time, from the 13th August, 1799, till their bankruptcy, to receive any other debt due from W. Wilson, the defendant, for the use of any other person, except the debt due on the note, which is the ground of this action, and another note for about the same sum, which they held as the agents of John Codman, and in trust for his use; in such case, those payments of monies may be applied to the discharge of those two notes; unless the jury shall be satisfied by testimony, that the said defendant did make those payments, or any of them, for some other purpose or purposes, respectively.

"The plaintiff had offered to prove, by the testimony of Andrew Ramsay, that the payments or advances of money to him and William Ramsay, charged in the account offered by the defendant, William Wilson, in the words and figures following," [Here was inserted an account current made out by the defendant against A. and W. Ramsay, containing, among others, sundry debits and credits of cash, subsequent to the time when the notes became payable, and before the bankruptcy of the Ramsays; by which it appeared, that they had paid to the defendant, during that time, more cash than he had paid to them, without specific appropriation; but the balance of the whole account, (which commences in April, 1797, and continues to October 15, 1801) was against the Ramsays to about the sum of 10,000 dollars.] "were not made on account of the notes due to John Codman, or either of them, and that they were not received by the said A. and W. Ramsay, on account of the said notes, or either of them; and had also offered in evidence two letters from the defendant, admitted to be in his hand-writing, in the words and figures following," [Here were inserted two letters from the defendant to John Codman, the first dated 21st January, 1800, saying, that he had paid a small part of the notes to A. and W. Ramsay, and would gladly settle the remainder, if it was in his

power; the second is dated 25th February, 1800, offering to pay the notes in real estate, or to give a mortgage.] "whereupon the court refused to give the instruction as prayed;" to which refusal the defendant excepted.

The 3d bill of exceptions was to the opinion of the court, that it was necessary for the plaintiff to prove the assignment of the note, but that it was not necessary for him to prove that the same was made *for value received*, by the said A. and W. Ramsay, from the said John Codman.

The 4th bill of exceptions was to the admission of the note and indorsement in evidence to the jury, the indorsement being in these words: "We assign this note to John Codman, *without recourse*," and signed by A. and W. Ramsay, the payees of the note; inasmuch as the indorsement varied from that set forth in the declaration; the former being "*without recourse*," and the latter "*for value received.*"

E. J. Lee, for plaintiff in error, made the following points:

1st. That the defendant below was entitled to *oyer* of the letters testamentary, at the time he demanded it.

2d. That the plaintiff was bound to produce them on the trial, upon the issue of *nil debet.*

3d. That the plaintiff was bound to prove the assignment to have been made *for value received*, according to the averment in the declaration.

4th. That the defendant below had a right, at any time, to apply the payments of money made to A. and W. Ramsay, to the account of the notes in question; the Ramsays being, at that time, personally his debtors, and having no right to demand of him money upon any other account.

5th. That the replication to the second plea was bad upon special demurrer.

WILSON v. CODMAN'S EXECUTOR.

1st. The executor was bound to produce his letters testamentary, and the defendant was entitled to *oyer* at any time.

In Virginia, if the plaintiff dies before office-judgment, the suit abates, and the executor must proceed *de novo*. If the plaintiff dies after judgment, the executor must take out a *scire facias*, in which he must make a *profert* of his letters testamentary. When the *scire facias* issues, the cause goes to the *rules*, and the defendant has a month to plead. In the present case, the change of parties was made in court, and the defendant had not yet appeared; he had, therefore, time till the next term to appear and plead, and had then a right to demand *oyer*. 6 *Mod.* 134, *Adams* v. *Savage*. *Idem*, 142, *Smith* v. *Harman*. By the act of congress, *vol.* 1, *p.* 71, § 31, a *scire facias* is to issue in case of the death of a party before judgment. The law of Virginia, *Revised Code*, *p.* 117, § 20, is nearly the same.

The act of congress does not do away the necessity of an executor's showing his letters testamentary, nor deprive the defendant of his right of *oyer*.

PATERSON, J. Under the act of congress, do not the proceedings go on of old? Are there to be any proceedings *de novo*?

E. J. Lee. There is no doubt that the executor must show his letters testamentary on admission to prosecute, and the defendant has a right to demand *oyer* at some time.

MARSHALL, Ch. J. The question is, whether, under the act of congress, a *scire facias* is necessary.

WASHINGTON, J. There is another question, whether the defendant did not crave *oyer* in due time.

E. J. Lee. The plaintiff ought to produce his letters testamentary at the time he is admitted, or when *oyer* is prayed, or at the trial, to support his title.

MARSHALL, Ch. J. No doubt the defendant was entitled to *oyer*, but the question is, has he demanded it in proper time?

E. J. Lee. 3d. The plaintiff ought to have proved that the note was assigned *for value received.* The assignment on the note is expressed to be "*without recourse.*" There was, therefore, a variance between the assignment on the note, and that set forth in the declaration. The court, therefore, ought either to have prevented the assignment from being produced in evidence, or have compelled the plaintiff to prove it was really for value received. By thus admitting the assignment to go in evidence, they have prevented the defendant from his right to offset his payments to A. and W. Ramsay before the assignment.

If there be a variance between the evidence and the declaration, it is fatal, how trivial soever it may be. If the plaintiff undertakes to recite an instrument, although he is not bound so to do, and misrecites it, he must fail. Thus, in trover for a debenture, the plaintiff must prove the number of the debenture as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited. But he need not set out the number, (any more than the date of a bond for which trover is brought) for being out of possession, he may not know the number, and if he should mistake, it would be a failure of his suit. *Buller N. P.* 37. So in the case of *Bristow* v. *Wright*, *Doug.* 665, it was held, that in an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a *nonsuit.*

MARSHALL, Ch. J. You consider the declaration as setting forth the indorsement *in hæc verba.*

E. J. Lee. I do.

MARSHALL, Ch. J. The only question upon this point is, whether the plaintiff has undertaken to set forth the indorsement *in hæc verba;* for if so, and there is a variance, there is no doubt it would be fatal.

WILSON v. CODMAN'S EXECUTOR.

E. J. Lee. 4th. The defendant below had a right to apply all the cash paid by him to A. and W. Ramsay, to the discharge of the notes. They had no right to say it was a gift or a loan, and they had no other right to demand money of him, than for those notes. If the appropriation was not made at the time of the payment, yet it could be applied only to the single debt due.

5th. *As to the demurrer.* 1st. The declaration states the assignment to be *for value received.* The replication, instead of fortifying the declaration, states, that it was not for value received, which, being repugnant, is a departure in pleading. Thus, if the plea be *conditions performed*, and the rejoinder shows matter in excuse for not performing, it is a departure. 4 *Bac. Ab.* 123. *Departure in Pleading, L.* If a note is given to me as agent for another, it is not given to me for value received. 2d. There is no traverse, denial, or confession of the matter of the plea. 4 *Bac. Ab. H.* 70.

C. Lee, on the same side. If the plaintiff is not the true executor, a judgment in this suit would be no bar to an action by the rightful executor. Hence it is necessary that he should produce his letters testamentary. It does not appear that he ever produced them in the court below at any time. He ought to have been compelled to produce them at the trial, on the issue of *nil debet*, to support his title. The plea of *nil debet* put the plaintiff on the proof of every thing necessary to entitle him to recover. It has been considered as law in Virginia, that on that plea the defendant may give in evidence the statute of limitations, which he could not do on *non assumpsit*; because the latter plea is in the past tense, and the statute does not prove that he never promised. But the plea of *nil debet* is in the present tense, that he does not *now* owe, and, therefore, if the debt is barred by the statute, the plea is well supported. If an executor bring an action of *assumpsit*, the defendant pleads *non assumpsit*, in manner and form as the plaintiff has declared; that is, he did not assume to pay to the testator in his lifetime. The plaintiff, in such case, is only bound to prove that the defendant promised to pay the testator, and his own title as executor does not come in question. But if an executor bring an action of *debt*, and the defendant

pleads *nil debet*, he says that he owes nothing to the present plaintiff, who sues as executor; and if the plaintiff be not the true executor, the plea is supported; the defendant, in truth, owes *him* nothing. Hence arises the difference between the necessity of producing letters testamentary in evidence on the trial in actions of *assumpsit*, and in those of debt on simple contract.

Simms, contra. In this case there was an office-judgment against Wilson and his appearance-bail. The bail came in and set aside the office-judgment, by pleading for his principal (as he had a right to do under the act of assembly of Virginia) in the life-time of John Codman, and the issue was made up. Afterwards John Codman died, and Stephen Codman, his executor, appeared, and had leave to prosecute the action.

We differ from the opposite counsel as to the construction of the act of congress. They seem to think that the pleadings must be *de novo*.

But it is in the discretion of the court what pleas to admit after the issue had been made up.

It is said Wilson was not in court. But it was his own fault to suffer judgment to go against him. No man can take advantage of his own neglect. It was a matter of discretion with the court to admit the principal to appear and plead after the issue had been made up by the bail. It is to be presumed, that the executor produced his letters testamentary, and that the court was satisfied when they admitted him to prosecute as plaintiff. If the defendant did not then pray *oyer*, it was his own neglect. He can only demand *oyer* at the term when the letters were produced, 5 *Co.* 74, (*b.*) *Wymark's case*. But letters testamentary need not remain in court even during the whole of *that* term, 2 *Salk.* 497, *Roberts* v. *Arthur*.

As to the demurrer, two causes are assigned. First, that the replication is a departure; and second, that it does not traverse the matter of the plea.

1st. Unquestionably, if it is a departure, it is bad. But if it is the only fortification of the declaration against the plea, it must be good. *Co. Lyt.* 304, (*a.*) The replication is not repugnant to, nor inconsistent with, the declaration. It is the same in substance with that in the case of *Winch* v. *Keely*, 1 *T. R.* 619, which was adjudged good on demurrer.

2d. It is said, that the replication ought to have traversed the matter of the plea.

What part could the plaintiff have traversed? The bankruptcy is impliedly admitted in the replication.

WASHINGTON, J. Part of the objection is, that the replication does not confess the matter of the plea.

Simms. That is not set down as a cause of demurrer, and it is but matter of form. But it is no cause for demurrer even if it had been specially shown. In a plea of the statute of limitations, the defendant does not confess that he ever promised at all. So in a replication to such a plea, that the plaintiff was out of the country, he does confess that the five years have elapsed. So in pleading a release, it is not necessary to admit the execution of the bond, &c.

No authorities can be produced in support of such an objection.

As to payments of money, it appears from the account itself, that Wilson, after the notes became due, received more cash from A. and W. Ramsay than they received from him; and it is evident, that the cash transactions were mere matters of mutual accommodation, by loans of small sums for short periods of time.

As to the first bill of exceptions, it is said, that the plaintiff ought to have produced his letters testamentary on the trial; and that a judgment, in this suit, would not be a bar to an action by the rightful executor.

This we deny. In a suit brought by the name of John, it is not necessary on the trial of the general issue

to prove that the plaintiff was baptized by that name. So if the plaintiff sue, as executor, when he is only administrator, and no advantage taken by plea in abatement, it is not necessary, on the trial, to produce letters testamentary.

The 3d and 4th bills of exception raise two questions.

1. Whether the assignment ought to have been proved, on the trial, to be for value received.

2. Whether the assignment on the note varies from that stated in the declaration.

It is said, that the *probata* and the *allegata* must precisely agree. This is not the law. It is sufficient if they agree in substance. In an action of assault and battery, the declaration, alleging it to be done with sticks, staves and swords, is sufficiently supported by evidence that the defendant pulled the plaintiff's nose. So if the declaration allege, that goods were sold and delivered at the request of the defendant, it is sufficient to prove that the defendant reluctantly received them at the solicitation of the plaintiff. It is only necessary to prove the material averments to be substantially true.

The substance, in the present case, is the note and the assignment. The manner is totally immaterial. No form of assignment is prescribed by the act of assembly; and it is not necessary, under the act, to state the precise words of the assignment. If the assignment had been in consideration of a horse received, it would have been sufficient to have stated, generally, that it was for *value* received. The words *without recourse* do not imply *without value*, nor do they alter the effect of the assignment as it regards the defendant. The declaration does not pretend to set forth the assignment *in hæc verba*; and, therefore, the case from *Doug.* 665, does not apply, 2 *Salk.* 658, *Holman* v. *Borough. Doug.* 193, *the King* v. *May.*

WILSON v. CODMAN'S EXECUTORS.

MARSHALL, Ch. J. Does not your defence rely on there being no value received?

Simms. I contend not. I shall presently take the distinction.

WASHINGTON, J. The departure is alleged upon that ground.

Simms. A moral obligation on the part of A. and W. Ramsay is a sufficient consideration for the assignment. They were bound in honesty and good faith to assign, and that is sufficient to support the allegation of *value received.*

The maker of the note has no right to inquire into the consideration which passed between the assignor and assignee.

If the note had not been, from the first, held in trust for Codman, the defendant might have offset all his claims against the Ramsays, which were due before notice of the assignment.

No offset against the trustee can be set up against *cestui que trust.* The authorities cited in *Winch and Keely* can be produced if the court should require it.

MARSHALL, Ch. J. There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot offset, against the debt due from him to the principal, claims against the agent. It cannot be contested. No man ever thought, that a person who employs an agent to collect his debts, by this agrees to take on his hands the debts owing by his agent to his debtors, instead of looking to the original debtors themselves.

C. Lee, in reply.

1st. As to the letters testamentary.

The act of Congress does not take away the necessity of giving notice to the other party. It does not essentially alter the law on that subject. By that law a *scire facias* must have issued and would have been returnable to the next term. One of the clauses of each act is in the same words. The act of congress is equally applicable to the death of plaintiffs and defendants. A *scire facias* must issue in both cases. And if it had issued, the defendant would have been in time.

2d. The plaintiff ought to have produced his letters testamentary at the trial, to support his title, on the issue of *nil debet.*

This has been spoken to before.

3d. As to the demurrer.

It is an answer to the case of *Winch* v. *Keely*, 1 *T. R.* 619, that in our case the demurrer is *special*, in the other it was *general.* It will also appear, that in that case, the facts of the pleas were expressly admitted in the replication. The demurrer there was for the purpose of bringing into consideration an important question of law.

The 1st cause of demurrer assigned is, that the replication is a departure. It is only necessary to know what the declaration is.

The expression, *for value received*, means value received by the defendant of the Ramsays, and by them of the plaintiff. The declaration states it to be Ramsay's debt, the replication alleges it to be Codman's debt.

4th. The variance between the declaration and the note offered in evidence, is material. If they had produced a note assigned for value received, the plea of bankruptcy of the Ramsays would have been good. If they had proved their declaration, they would have defeated their action. It is admitted, however, that it would be a question of some doubt, whether the variance would be absolutely fatal if the action were on a

WILSON v. CODMAN'S EXECUTOR.

parol agreement, upon the authority of the note at the end of the case of *Bristow* v. *Wright*, *Doug.* 669, (*3d edition*) which confines this strictness of pleading to records and written contracts. But the present action is upon a written contract, and, therefore, according to all the authorities, a misrecital is fatal.

5th: As to the bill of exceptions respecting the testimony, it is only necessary to read the prayer of the defendant to the court, (without intermixing the testimony offered by the plaintiff, which only confuses the question) to show the impropriety of the court's decision.

The amount of the prayer is, that the payments ought to be presumed to be made on the notes, unless it is proved that they were made for some other purpose, or on some other account; it having been proved that the Ramsays had no right to demand money from the defendant, except on account of those notes.

March 6.

MARSHALL, Ch. J. delivered the opinion of the court.

The first question which presents itself in this case is, was the defendant entitled to *oyer* of the letters testamentary at the term succeeding that at which the executor was admitted a plaintiff in the cause?

It is contended, on the part of the defendant, that on the suggestion of the death of either plaintiff or defendant, a *scire facias* ought to issue, in order to bring in his representative; or, if a *scire facias* should not be required, yet, that the opposite party should have the same time to plead and make a proper defence as if such process had been actually sued.

The words of the act of congress do not seem to countenance this opinion. They contemplate the coming in of the executor as a voluntary act, and give the *scire facias* to bring him in, if it shall be necessary, and to enable the court "to render such judgment against the estate of the

deceased party," "as if the executor or administrator had voluntarily made himself a party to the suit." From the language of the act this may be done *instante*. The opinion, that it is to be done on motion, and that the party may immediately proceed to trial, derives strength from the provision, that the executor or administrator, so becoming a party, may have one continuance. This provision shows, that the legislature supposed the circumstance of making the executor a party to the suit, to be no cause of delay. But as the executor might require time to inform himself of the proper defence, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him.

There is, then, nothing in the act, nor is there any thing in the nature of the provision, which should induce an opinion, that any delay is to be occasioned where the executor makes himself a party and is ready to go to trial.—Unquestionably, he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute; but if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor.

If the court has unguardedly permitted a person to prosecute who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means.

The second point in the case is the demurrer of the defendant to the plaintiff's replication.

Two causes of demurrer are assigned. 1st. That it is a departure from the declaration. 2d. That the plea ought to have been traversed, and an issue tendered thereon.

On the first cause of demurrer, some difference has existed in the court, but the majority of the judges concur in the opinion, that the replication fortifies, and does not depart from the declaration.

The averment, that the assignment was for value received, is an immaterial averment. The assignee, without value, can as well maintain his action as the assignee, on a valuable consideration. It is, therefore, mere surplusage, and does not require to be proved; nor does it affect the substantial part of the declaration. It is also the opinion of a part of the court, that the duty created by the trust, and which was discharged by the assignment, may be considered as constituting a valuable consideration to support the averment, and prevent the replication from being a departure from the declaration.

2d. The second cause of demurrer is clearly not maintainable. The matter of the replication does not deny, but avoids the allegations of the plea, and, consequently, the conclusion to the court is proper.

It has, indeed, been argued, that the replication is faulty, because it does not confess the matter alleged in the plea; but this is not assigned as a cause of demurrer, and it is, therefore, not noticed by the court.

The demurrer having been overruled, several exceptions were taken at the trial to the opinion of the court.

The first was to the admission of the note as evidence. This was objected to, because the declaration averred the note to be assigned for value received, and the assignment contained no expression of a valuable consideration, but was declared to be made "without recourse." As the assignment is not set forth *in hæc verba*, this exception is so clearly unmaintainable that it will require only to be mentioned.

The 2d exception requires more consideration. It is, that although the averment that the assignment was made for value received was immaterial, yet the plaintiff, having stated the fact in his declaration, is bound to prove it. In support of this position, *Bristow* v. *Wright*, *Doug.* 665, has been quoted and relied on.

The strictness with which, in England, a plaintiff is bound to prove the averments of his declaration, al-

though they may be immaterial, seems to have relaxed from its original rigour.

The reasons stated by Lord Mansfield, in the case reported by *Douglas*, for adhering to the rule, do not apply in the United States, where costs are not affected by the length of the declaration.

Examining the subject with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument, which, by being untruly described, may, by possibility, mislead the opposite party.

Where, then, the averment in the declaration is of a fact *dehors* the written contract, which fact is in itself immaterial, it is the opinion of the court that the party making the averment, is not bound to prove it.

In this case, the averment, that the assignment was made for value received, is the averment of a fact, which is perfectly immaterial, and which forms no part of the written assignment; nor is it averred to be a part of it. It is an extrinsic fact, showing how the right of action was acquired, but which contributes nothing towards giving that right of action. The party making this useless averment ought not to be bound to prove it.

No case which has been cited at bar, comes up to this. The averments of the declaration, which the plaintiff has been required to prove, are all descriptive of records, or of written contracts; not of a fact, at the same time extrinsic and immaterial. The court is, therefore, unanimous in the opinion, that this exception cannot be maintained.

In the progress of the trial, the counsel for the defendant, in the court below, also required that court to instruct the jury, that unless the plaintiff could show that the Ramsays, who were his agents, had the power

WILSON v. CODMAN'S EXECUTOR.

to collect some other debt from the defendant, the payments made by him, to them, should be credited on the notes given to them in trust for Codman, which instruction the court very properly refused to give.

Independent of the proof made by the plaintiff, that the sums of money received by the Ramsays from Wilson, were really on their own account, the instruction would not have been proper as this case actually stood. There was a running account between the Ramsays and Wilson, who had large transactions with each other, and who reciprocally advanced large sums. This running account is not stated by the defendant, in the proposition for the opinion of the court. The effect it produces, is to make it proper for Wilson to prove, that advances made by him to the Ramsays, were not designed to satify their particular engagements with each other, but were intended to discharge the debt due to Codman. Terms are improperly used in the bill, which imply a fact contradicted by the testimony. The word payment is used instead of the word advance, and this, at first view, may produce an obscurity, which is dissipated on investigating the record.

The judgment is to be affirmed with costs.

HALLET AND BOWNE v. JENKS AND OTHERS.

HALLET AND BOWNE v. JENKS AND OTHERS.

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land

THIS was a writ of error to "The court for the trial of impeachments and correction of errors, in the state of New-York," under the act of congress, of the *24th September*, 1789, § 25, *vol.* 1, *p.* 63, which gives the supreme court of the United States, appellate jurisdiction upon a judgment in the highest court of a state, in which a decision in the suit could be had, where is drawn in question, the construction of any clause of a

statute of the United States, and the decision is against the right, privilege or exemption, specially set up or claimed by either party, under such statute.

The action was upon a policy of insurance, and the only question to be decided by this court was, whether the risk insured was illegal, under the act of congress (commonly called the *non-intercourse* law) *of the 13th June*, 1798, *vol.* 4, *p.* 129. For, although another question appears to arise upon the record, viz. whether a condemnation in a foreign court, as enemy's property, be conclusive evidence of that fact, yet this court is prohibited by the same 25th section of the act of 1789, to consider any other question than that which respects the construction of the statute in dispute.

On the trial of the general issue, a special verdict was found, containing the following facts:

That on the 27th day of April, 1799, the defendants, for a premium of 25 per cent, insured for the plaintiffs, *against all risks*, 1,000 dollars, upon twenty-five thousand pounds weight of coffee, valued at 20 cents per pound, on board the sloop Nancy, from Hispaniola to St. Thomas. That in the margin of the policy was inserted a clause in the following words: "warranted the property of the plaintiffs, all Americans," but that the words *all Americans*, were added after the policy was subscribed; that the sloop Nancy was built at Rhode-Island, and belonged to citizens of the United States, resident in Rhode-Island, as well when she left that state as at the time of her capture, and, being chartered by the plaintiffs, sailed from New-Port, in Rhode-Island, on the 12th day of December, in the year 1798, on her first voyage to the Havanna; that in the course of the said voyage, she was compelled, being in distress, to put into Cape-Francois, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th day of January, 1799; that the captain and supercargo of the sloop were part owners of the cargo, and are two of the plaintiffs in this suit; that having so put into Cape-Francois, the cargo was landed to repair the vessel; that the public officers, acting under the French government there,

her cargo in order to make repairs, and prevented by the officers of the French government from reladingher original cargo, and from taking away any thing in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the *non-intercourse* act of the 13th June, 1798. And such voyage was not illegal, so as to avoid the insurance.

HALLET AND BOWNE v. JENKS AND OTHERS.

took from them nearly all the provisions on board the sloop, and the captain and supercargo were permitted to sell, and did sell, the remainder to different persons there; that the captain and supercargo made a contract with the public officers, by which, they were to be paid for the provisions in thirty days, but the payment was not made; that, with the proceeds of the remaining parts of the cargo, they purchased the whole of the cargo which was on board at the time of the capture, and also seventeen hogsheads of sugar, which they sent home to New-York, on freight; that the said officers *forbade* the said master and supercargo of the sloop, from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by reason whereof, they were *compelled* to sell the same, and to take the produce of that country in payment; that the sloop, with thirty thousand weight of coffee on board, twenty-five thousand pounds weight of which was intended to be insured by the present policy, sailed from Cape-Francois, on the 23d day of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great-Britain, as for being the property of American citizens, trading contrary to the laws of the United States; that, at the time of the capture of the sloop, besides the documents aforesaid, the following paper was found on board: "Liberty, Safe Conduct, Equality——At the Cape, 11th Thermidor, sixth year of French Republic, one and indivisible. The General of division and private agent of the Executive Directory at St. Domingo, requests the officers of the French navy and privateers of the Republic, to let pass freely the American vessel called the
master, property of Mr. E. Born Jenks, merchants at Providence, state of Rhode-Island, in the United States, arrived from the said place to the Cape-Francois, for trade and business. The Citizen French Consul, in the place where the said vessel shall be fitted out, is invited to fill with her name, and the cap-

bain's, the blank left on these presents; in attestation of which he will please to set his hand hereupon.

(Signed) J. HEDOUVILLE.

(Signed) GAUTHIER, the General Secretary of the Agency."

which paper was received on board the sloop at Cape-Francois, and was on board when she left that place; that the property insured by the policy aforesaid, was claimed by the said Zebedee Hunt, and was condemned by a sentence of the said court of Vice-Admiralty, in the following words: "that the said sloop Nancy, and cargo on board, claimed by the said Zebedee Hunt, as by the proceedings, will show to be enemy's property, and as such, or otherwise, liable to confiscation, and condemned the same as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

That part of the act of congress, which the underwriters contended had been violated by the defendants in error, is as follows:

Sec. 1. *Be it enacted*, &c. "that no ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom after the first day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West-Indies, or elsewhere, under the acknowledged government of France, *or shall be employed in any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French republic.* And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place as aforesaid, *or shall be employed as aforesaid*, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue," &c.

HALLET AND BOWNE v. JENKS AND OTHERS.

Sec. 2, enacts, that after the first of July, 1798, no clearance for a foreign voyage shall be granted to any ship or vessel, owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given, in a sum equal to the value of the vessel and cargo, "*with condition*, that the same shall not, during her intended voyage, or before her return within the United States, proceed or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West-Indies, or elsewhere, under the acknowledged government of France, *unless by distress of weather, or want of provisions, or by actual force or violence*, to be fully proved and manifested before the acquittance of such bond; and that such vessel is not, and shall not be employed, during her intended voyage, or before her return, as aforesaid, *in any traffic or commerce with or for any person resident within the territory of that republic, or in any of the dependencies thereof.*" *June 13th*, 1798. *Vol. 4, p. 129.*

Mason, for the plaintiffs in error. If the insurance was upon an illegal transaction, the defendants in error have no right to recover. The only question for the consideration of this court is, whether it be a transaction prohibited by the act of congress. If the purchase of this cargo in *Cape-Francois* was lawful, the policy is good.

The first section of the act has two branches, and contemplates two separate offences—1st. That no vessel shall be allowed to go to a French port. But this prohibition must be subject to the general principle, that the act of God, or of the public enemy, shall be an excuse.

2d. That if driven into such port by distress, or involuntarily carried in, yet, there shall be no trade or traffic.

The words are, "if any vessel shall be *voluntarily* carried, or suffered to proceed to any French port or place as aforesaid, *or shall be employed as aforesaid.*" The *going in* must be *voluntary*, but the legislature carefully omit the word *voluntarily*, when speaking of the offence of trading; for all trading must be voluntary; it cannot

be by compulsion. The object was to prevent intercourse, and the statute only makes the same saving of the forfeiture, which a court would have made without such a saving clause.

The condition of the bond mentioned in the 2d section, confirms this construction of the 1st. It is divided into two clauses, agreeably to the two offences to be provided against. The proviso, "*unless by distress of weather*," &c. is annexed only to the offence of going into the port, but there is no saving or exception as to the offence of trading.

If she had not been driven in by distress of weather, she would have been liable to forfeiture under the first offence. But having been employed in traffic with persons resident, &c. she is equally liable to forfeiture under the second, and the condition of the bond has been substantially broken.

The special verdict states, "that the captain and supercargo were permitted to sell, and did sell the residue of the cargo to different persons there." Here was no compulsion. This selling was a violation of the law; but it is not that which avoids this policy. The fault was, that with the proceeds of those sales, the plaintiffs below purchased the cargo insured. There was no compulsion to do this, except what I shall presently notice, as stated in the verdict. It will probably be contended that the following words of the verdict show a compulsion, viz. "that the said officers forbade the said master and supercargo from taking on board the cargo landed from the said vessel, or from conveying from the said island any specie, by *reason whereof*, they were *compelled* to sell the same, and to take the produce of that country in payment." But this is only the reasoning of the jury, and the words, *by reason whereof*, show what kind of compulsion it was, and that it was not that inevitable necessity which can excuse the express violation of the law. The owners ought to have said to them, if you forbid us to take away our property, we must leave it, and look to our government for an indemnification; for they have forbidden us to sell it to you, or to purchase a new cargo. The forbidding them to relade their goods, and to take

HALLET AND BOWNE v. JENKS AND OTHERS.

away specie, was no compulsion to purchase produce. The verdict does not state that the master or supercargo attempted to resist the force; it may be wholly a colourable transaction.

The act of the 27th February, 1800, *vol. 5, p. 15*, shows what the construction of that of 1798 ought to be. The 3d section of the former provides, that in case the vessel shall be compelled, by distress or superior force, to go into a French port, and shall there necessarily unlade and deliver, or shall be deprived of any cargo then on board, the master may receive payment in bills of exchange, money or bullion, and not otherwise, "and shall not thereby be understood to contravene this law."

This is a clear implication, that if there had not been such an express permission to receive payment in bills of exchange, money or bullion, it would have been a contravention of the law; and that law, excepting this provision, is substantially the same as the law of 1798.

Harper, contra. I might safely agree to the first position taken by the opposite counsel, that the 1st section of the act of 1798 creates two distinct offences. But this is not so. The whole constitutes but one offence.

How is a ship to be employed in traffic? She must bring and carry. If she did not go voluntarily, she was not employed in trafficking. If the master sell the cargo, under such circumstances, the *vessel* is not employed in traffic.

But if the act creates two separate offences, how is the *vessel* employed in the traffic? She did not carry the cargo there voluntarily. But it being there, and *landed*, *necessarily* landed, how is the *vessel* concerned in the sales and purchases made by the master? The necessity of repairing the vessel is as much an excuse for landing the cargo, as stress of weather was for going in. The master was forbidden to relade it. But a difference is taken between *prohibition* and *prevention*. It is said that the *forbidding* is not *preventing*. But by whom was the prohibition? by the officers of the government, having authority and power to carry the prohibition into effect. It was, therefore, actual prevention.

What was the mischief intended to be remedied by the act of congress? Not such a sale as this. It was to prevent a *voluntary* intercourse, not to prevent citizens of the United States from rescuing their property from impending loss. What is traffic? A contract by consent of both parties. If one is under compulsion, it is no contract, no traffic. The transaction disclosed by the verdict is only the means of saving property from a total loss. The owners were not obliged to abandon, as the gentleman contends, property thus put in jeopardy. The master and supercargo were not free agents. They were not obliged to take bills which they knew would not be paid. If I could have had a doubt upon this case, it would have been removed by the decisions of the circuit courts of the United States. In a case before one of your honours,* in Baltimore, a vessel had brought home from the French West-Indies a cargo of the produce of those islands, after having been compelled to go in and sell her outward cargo; and it was decided, that the case was not within this act of congress. A similar case is understood to have been decided by another of your honours,† in New-York. If those cases were not within the law, I am warranted in saying this is not.

Those decisions produced the 3d section of the act of 1800, which the gentleman has cited, and which was introduced to shut the door that had been left open. It was perceived, that the law, as it stood before, would give an opportunity of fraud. The 3d section was enacted to take away the temptation; because, although there might be cases clear of fraud, it was thought best to sacrifice these particular cases, that fraud might be prevented in others. This section, therefore, has given a sanction to the decisions of the circuit courts.

Key, in reply. It is clear, that there are two distinct prohibitions in the act. The two parts of the section are connected by the disjunctive "or," and not by the copulative, "and." This is rendered still more evident by the form of the condition of the bond described in the 2d section.

* Judge *Washington*.

† Judge *Paterson*, in September, 1799, in the case of *Richardson and others*, cited in 1 *Caines' New-York Cases*, p. 63.

HALLET AND BOWNE v. JENKS AND OTHERS.

Whenever you rely on the necessity of the case to justify your acts, you must not go beyond the necessity. All beyond is voluntary. In this case it might go to the landing, and to the seizure of part, but not to the sale of the residue. The probability of loss is not necessity. If they took produce, it was only to avoid a greater loss. It was not an inevitable necessity.

Another fact shows that it was *trading*, not merely taking on board, to bring home, property which they were compelled to receive. She was not coming home with the property when she was captured, but going on a trading voyage. And the French pass states, that she came to Cape Francois for *trade and business*.

The intention of the act was to prevent all trading and intercourse with France or her dependencies.

In the case at Baltimore, before his honour, Judge *Washington*, the vessel returned directly home to Baltimore with produce, which she had been compelled to take or abandon.

Mason, on the same side. It is said, there must be a pre-existing intention to go to a French port. If the sloop had arrived safe at the Havanna, and been there sold to an agent of the French government, it is clear she would have been liable to forfeiture. So, if the French agent, who signed the passport, had freighted the vessel.

These cases show, that a pre-existing intention is not necessary. The construction contended for would, indeed, open a wide door to fraud, as the gentleman has contended. It would only be necessary to start a plank in sight of the port, and then go in to stop the leak, and the whole law is evaded.

March 6.

MARSHALL, Ch. J. delivered the opinion of the court, to the following effect:

The court is of opinion, according to the best consideration they have been able to give the subject, that this

case is not within the act of congress of 1798, usually called the non-intercourse law.

It is contended by the counsel for the defendant, that the circumstances, stated in the special verdict, do not show an absolute necessity for the trading therein described. And it is said, the plaintiff might have abandoned the property, and sought redress of his government; and that it was his duty to do so, rather than violate the laws of his country. But the court is of opinion, that the act of congress did not impose such terms upon a person who was forced by stress of weather to enter a French port, and land his cargo, and was prevented by the public officers of that port to relade and carry it away.

Even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and purchase a new cargo, I am of opinion, that it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo.

The terms of the act of congress seem to imply an intentional offence on the part of the owners.

The case put of a French agent going to the Havanna, and there purchasing the cargo for the use of the French government, under a pre-concert with the owners, would certainly be an offence against the law; but when there is no such intention; when the vessel has been absolutely forced, by stress of weather, to go into a French port, and land her cargo; when part has been seized for the use of the government of France, and the master has been forbidden by the public officers of the port to relade the residue, and to sell it for any thing valuable, except the produce of the country, the mere taking away such produce cannot be deemed such a traffic as is contemplated by the act of congress.

Judgment affirmed, with costs.*

* See the opinion of the supreme court of New-York, in this case, in 1 *Caines' New-York Cases*, 64; and that of the *High Court for the trial of Impeachments and correction of Errors, in the state of New-York*, delivered by *Lansing*, Chancellor, in 1 *Caines' New-York Cases in Error, p.* 43.

MILLIGAN v. MILLEDGE AND WIFE.

MILLIGAN, ADMINISTRATOR OF MILLIGAN v. MILLEDGE & WIFE.*

A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.

The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.

The want of proper parties is not sufficient ground for dismissing the bill.

ERROR to the circuit court for the district of Georgia, in chancery sitting.

The object of the bill was to recover from the defendants, as legatees and devisees of George Galphin, deceased, a debt due by him to the complainant's intestate, as surviving partner of Clark and Milligan. The bill charges, that Clark and Milligan were merchants in London; that Milligan survived Clark, and that the complainant is the administrator of Milligan, the survivor; that in the year 1770, they supplied George Galphin with goods; that in 1773, George Galphin requested them by letter to supply goods to his three sons, Thomas, George and John, his nephew David Holmes, and John Parkinson, under the firm of Galphin and Holmes; that on the credit of G. Galphin, the elder, they shipped goods, &c. to the said company.

That in 1776, G. Galphin, the elder, wrote to Clark and Milligan, to furnish goods to the said company, at their store in Pensacola, and that he would see them paid; that relying on the said engagement, they shipped further goods to the said company at Pensacola, and on the 31st of December, 1780, G. Galphin, the elder, owed,

	sterling.
For himself,	£1,120 1 2
For Galphin, Holmes & Co.	1,296 5 3
And, Jan. 1, 1784, for the Pensacola firm,	3,959 15 9

all of which is now due and unpaid.

* Present, *Marshall*, Ch. J. *Cushing*, *Paterson* and *Washington*, Justices.

This cause was called for argument on the 2d of March, but the counsel not having prepared statements of the points for the court, agreeably to the rule, the court refused then to hear it.

That G. Galphin, the elder, died testate in 1781, or 1782, and duly appointed James Parsons, John Graham, Laughlin M'Gillvray, John Parkinson, William Dunbar, and his sons, John, George and Thomas Galphin, his executors; and left real and personal estate, sufficient to pay all his just debts.

That all the executors declined the trust, excepting the three sons; that the copartnership of Galphin, Holmes & Co. was dissolved on the day of without any funds for the payment of their debts; that John and George Galphin, two of the executors, never meddled with the deceased's estate, having been long insolvent, are not within reach of the process of this court, are unknown to the complainant, and gone to places out of his knowledge.

That William Dunbar is dead, leaving no assets of the deceased's estate.

That David Holmes is dead, and left no property, to the knowledge of the complainant.

That Thomas Galphin and John Parkinson are out of the jurisdiction of the court, and not possessed of any property, to the knowledge of the complainant.

That John Milledge, and Martha his wife, who is daughter of G. Galphin, the elder, and a principal legatee and devisee under his will, have received, and are possessed of, lands, negroes, and assets of the estate of her father, which came to them by descent, devise, or distribution, and liable to the claim of the complainant.

That Thomas, who resides in South-Carolina, holds no property of the deceased in South-Carolina; that the assets in that state have all been exhausted in satisfying prior judgments, or otherwise.

That all the assets are in Georgia, in the hands of Milledge and wife, who must be considered as the agents and trustees of the executor, Thomas Galphin, or of the creditors, and liable to account for the same.

MILLIGAN v. MILLEDGE AND WIFE.

Milledge and wife, the only persons made defendants in the bill, pleaded in bar, as follows:

"The plea of Martha Milledge, one of the defendants to the bill of complaint of William Milligan.

"The end of the complainant's bill is to render liable to the payment and satisfaction of an unliquidated demand on an open account, said to be due by the estate of George Galphin, in his own right, and as security and guarantee for Galphin, Holmes and company, certain property, real and personal, which is charged by the complainant to have come into the hands and possession of this defendant, as one of the devisees and legatees of the said George Galphin, deceased.

"This defendant, by protestation not confessing all or any of the matters contained in the said bill to be true, in such manner and form as the same is therein set forth and alleged, doth plead in bar of the same, and for plea saith, that the complainant states that David Holmes, late copartner in the house of Galphin, Holmes & Co. and David Holmes and Co. is dead, and left no property or legal representatives, at his decease, within the state of Georgia; that neither John Parkinson, nor William Dunbar, have ever qualified on the will of George Galphin, and have never come into the possession of any of the estate of the said George Galphin, or if they have, that it is disposed of and exhausted; that Thomas Galphin holds no property or estate of the said George Galphin, and that the assets of the said estate in the state of South-Carolina, have all been exhausted in satisfying prior judgments, or otherwise.

"But this defendant avers, that the said David Holmes died possessed of considerable estate, real and personal, part of which, if not all, must be in possession of his legal representatives; that William Dunbar *qualified* on the will of the said George Galphin, and died, leaving in the possession of his executors, administrators or legal representatives, considerable estate, real and personal, which he got, either by being

one of the *qualified* and acting executors on the said will, or by his intermarriage with Judith Galphin, one of the devisees and legatees under the will of the said George.

"And this defendant further avers, that Thomas Galphin and John Parkinson, charged and stated to be two of the surviving copartners of Galphin, Holmes & Co. and David Holmes & Co. of which this defendant knoweth not, and said Thomas Galphin, being now the only acting and qualified executor of the last will and testament of the said George Galphin, are, and this defendant is ready to show, that they *must be* in possession of considerable real and personal estate, derived from the estate of the said George Galphin, deceased; that they are the proper persons liable and interested to contest, and who can with safety contest, the complainant's demands, if any he has, and the relief prayed in the said bill.

"And this defendant doth further aver, that the debt or demand of the complainant, if any doth exist, originated in the state of South-Carolina; that all material, necessary, and indispensable and requisite parties, to wit, the said Thomas Galphin and John Parkinson, and the executors, administrators or legal representatives of William Dunbar, live, and notoriously and openly reside, in the state of South-Carolina, and in possession of estates, real and personal, sufficient to pay the complainant's demand, if any he has, and which estates and property are more particularly liable to the said demand, if any he has; and that the said parties are also amenable and compellable to appear to any suit or bill brought against them by the said complainant, for his said demand, if any he has, in the state aforesaid. All of which facts are in the knowledge of the complainant, and to him well known, before the filing of his said bill, for that the complainant also lives and resides in the state of South-Carolina; that this defendant is an entire stranger to, and ignorant of the merits and justice of the claim set up by the complainant, not being named as executrix in the will of the said George Galphin, or ever having intermeddled with the *concerns* of the said estate, or any ways

MILLIGAN v. MILLEDGE AND WIFE.

interested in the copartnership aforesaid. All which matters this defendant doth aver and plead, in bar of the complainant's said bill, and of his pretended demands, for which he seeks to be relieved by his said bill. And this defendant prays to be hence dismissed, with her reasonable costs, in this behalf most wrongfully sustained."

This plea was sworn to, before a justice of peace.

The plea of John Milledge was the same, in substance, as that of his wife.

There was also a joint and several answer of Milledge and wife, which states no other facts than the following: viz. "That there never did exist any secret or special trust, promise, covenant, or understanding, between these defendants and the executors of George Galphin, the elder, deceased, as charged in the bill of complaint, or did these defendants, or either of them, ever give any bond of indemnity, or other security whatever, to be accountable to Thomas Galphin, or John Parkinson, or any or either of the executors of the said George, for any property, real or personal, which *might have come* into the possession, or held by either of these defendants. That there does not now exist any secret or special trust, promise, covenant or understanding between these defendants and the executors aforesaid. And these defendants do, jointly and severally, deny all manner of unlawful combination," &c. "without that, that any other matter or thing in the said bill of complaint contained, material or necessary for these defendants to answer unto, not herein answered unto. All which matters and things these defendants are ready to aver and maintain," &c.

At May term, 1803, of the circuit court, holden by his honor, Judge Moore, the only entries on the transcript of the record which came up, are, as follows: "Bill and amended bill." "Plea and answers." "On argument the plea sustained." There is no entry of a *demurrer*, or motion, or of any other proceeding, except the continuances, after filing the pleas and answers, until the May term, 1803.

At May term, 1804, of the circuit court, holden by his honor, Judge Johnson, the following decree was made.

"This cause came on to be heard this 14th day of May, in the year of our Lord, 1804, upon the bill and exhibits, and the pleas and answers of the defendants; whereupon, it appearing that in the term of May, 1803, before the honourable Alfred Moore, one of the judges of the said court, the cause was heard upon the bill and the pleas, and that after argument, it was adjudged by the court, at the term of May, 1803, that the said plea be sustained; and it appears that the complainant hath not replied to the said plea. It is therefore ordered and decreed, that the bill of complaint be dismissed, in pursuance and conformity to the decision of the court at the said term, upon the said plea, the same appearing to the court, to be conclusive on the merits of the complainant's bill.

Dated at Savannah, the day and year before written.

WILLIAM JOHNSON, Jun.

The complainant sued out his writ of error, and assigned for error,

1st. That by the said decree it is adjudged and decreed, that the plea in bar aforesaid, and the matters therein contained, are sufficient to debar the complainant from the discovery and relief sought after by his said bill of complaint, and are conclusive on the merits thereof, and that, therefore, the said plea should be sustained as a valid and sufficient answer to the bill of the complainant. Whereas, the said plea is altogether irrelevant and insufficient, and contains no matter, which, in law or equity, ought to bar the discovery and relief sought after by the bill aforesaid.

2d. That by the said decree, it is adjudged that the bill be dismissed, whereas, by the law of the land, and the rules of equity, a decree ought to have been made in favour of the complainant, for want of a suf-

MILLIGAN v. MILLEDGE AND WIFE.

ficient answer upon the merits of the said bill, as to the relief prayed thereby.

Key, for plaintiff in error, contended, that the pleas in bar were insufficient and informal, and contained matter not proper for a plea.

The defence proper for a plea, must be such as reduces the cause to a particular point, and from thence creates a bar to the suit; and is to save the parties expense in examination. It is not every good *defence* in equity, that is likewise good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea; the examination must still be at large; and the effect of allowing such a plea, will be, that the court will give their judgment on the circumstances of the case, before they are made out by proof. 1 *Atk.* 54. *Chapman* v. *Turner*.

A plea cannot be a mere denial of facts charged in the bill; for such matter is only proper for an answer. But such a plea may be permitted to stand for an answer, with leave to except to its insufficiency. 1 *Brown, Ch. Ca.* 408, 409, 410.

The plea in this case sets forth five several distinct and independent matters, each of which is a denial of some allegation in the bill, and is, therefore, not proper for a plea, but for an answer. Nor do they go to make up one defence.

The most that can be said of the plea is, that it shows that there are other persons who ought to be made parties in the cause. Considered in this view, it may be supposed, perhaps, as requiring that Thomas Galphin, J. Parkinson, the representatives of David Holmes, and those of W. Dunbar, should have been made parties.

There can be no ground of requiring the representatives of Holmes to be made parties, because we seek relief only against the estate of G. Galphin, the elder, and not against that of Holmes. As to the representatives of Dunbar, even if it be true that he qualified

as executor, yet we are not bound to proceed against them, as there is an executor surviving. We ask no relief against Parkinson, and, therefore, we need not make him a party. And as to Thomas Galphin, he is expressly alleged in the bill, and admitted in the plea, to be out of the jurisdiction of the court, and therefore, we were not bound to make him a party. This is expressly laid down by *Mitford, in his treatise of pleading, p.* 93, who says, "if a want of proper parties is not apparent on the bill, a defendant may plead it; and a plea of this nature goes both to the discovery and the relief. *But where a sufficient reason is suggested by the bill, for not making the necessary party;* as where a personal representative is a necessary party, and the bill states that the representation is in contest, in the ecclesiastical court; *or where a necessary party is resident abroad, out of the jurisdiction of the court, and the bill charges that fact;* or where the bill seeks a discovery of the necessary parties, *a plea for want of parties will not be allowed.* A plea for want of parties to a bill, for a discovery merely, will not hold; for the plaintiff in that case seeks no decree." *Prec. in Ch.* 83. *Cowslad* v. *Cely.* 2 *Atk.* § 10. *Darwent* v. *Walton.*

As far as our bill seeks for relief, we could recover at law, against the defendants, as executors in their own wrong. It is true, that in equity, an executor *de son tort* is not known, but whenever a person would, at law, be executor *de son tort*, he will, in equity, be considered as a trustee for the creditors.

Real estate is in Georgia considered as assets. (See the case of *Telfair* v. *Stead's* executors, in this court at this term, *ante, vol.* 2, 407.)

The bill charges that the defendants have assets.

All the facts charged in the bill, and not denied in the plea or answer, are to be considered as admitted.

The bill also charges, that there are no assets in South Carolina.

We were, therefore, obliged to go against the assets in Georgia.

MILLIGAN v. MILLEDGE AND WIFE.

It is no bar to say, that there is an executor in South Carolina who has no assets; and it was not necessary that we should make such an executor a party.

MARSHALL, Ch. J. The only question is, whether it is not necessary that you should bring a suit against the executor in South Carolina, to establish the *debt*; because, as to that, he is the proper person to defend. After having obtained such a judgment, the complainant would be at liberty to follow the estate in the hands of the defendants, in Georgia. It is not necessary to consider them as executors in their own wrong; for you may proceed against devisees or legatees, if the executor has no assets.

Key. If the bill is against the heir, it is not necessary to make the executor a party.

MARSHALL, Ch. J. But that is, where the heir is the proper person to defend.

Key. It is not necessary to make the executor a party, when we can have no relief against him, 2 *Eq. Ca. Ab.* 167. But if he ought to be a party, yet it is cause for dismissing the bill.

MARSHALL, Ch. J. No doubt of that. The bill might have stood over to make new parties.

March 6.

MARSHALL, Ch. J. The court is of opinion, that the court below erred in admitting the pleas, and dismissing the bill.

Judgment reversed.*

* The decree of reversal was as follows: "This cause coming on to be heard and considered, and counsel on the part of the appellant being heard, and the bill, pleas, and answers, being read and considered,

"It is adjudged, ordered and decreed, that the decree of the circuit court be reversed, with costs of this appeal; that the pleas of the defendants be overruled, and that they be ordered and decreed to answer the bill exhibited against them."

COOKE v. GRAHAM'S ADMINISTRATOR.*

ERROR to the circuit court of the district of Columbia, sitting at Alexandria.

A variance in date between the bond declared upon, and that produced on *oyer*, is matter of substance, and fatal upon the *plaintiff's* special demurrer to the defendant's bail rejoinder.

The court may depart from the letter of the condition of a bond, to carry into effect the intention of the parties.

The declaration was in debt on a bond dated the 3*d of October*, 1799, in the penalty of 5,000 dollars. On *oyer*, the bond appeared to be dated the 8d of *January*, 1799, and the condition was as follows: "Whereas, the said Stephen Cooke did lend to Josiah Watson, of the town of Alexandria, twenty-five hundred dollars of the said William Graham's money; and the said Josiah Watson having failed, but before he failed paid five hundred dollars; and whereas, the said Stephen Cooke hath instituted a suit against the said Josiah Watson, for the recovery of the said money—Now the condition of the above obligation is such, that if the said Stephen Cooke shall well and truly pay the whole sum so lent, if it can be recovered from the said Josiah Watson, or his indorsor; or in case it cannot be wholly recovered, will lose the one half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue."

After *oyer* granted, the defendant had leave to imparle, but not pleading at the rule day, judgment was rendered at the rules for want of a plea.

At the next term, the defendant set aside the office-judgment, by demurring generally to the declaration, which demurrer was joined by the plaintiff.

Afterwards, on motion, the defendant had leave to withdraw his demurrer, and pleaded general performance of the condition of the bond. To which the plaintiff replied, and assigned a breach in this, that the defendant has not paid the sum of money mentioned in the condi-

* Present, *Marshall*, Ch. J. *Cushing*, *Paterson* and *Washington*, Justices.

COOKE v. GRAHAM'S ADMINISTRATOR.

tion, or any part thereof. The defendant rejoined, that the sum of money in the condition mentioned, lent by him to Watson, could not be recovered from the latter, or his indorsor.

To this rejoinder the plaintiff demurred specially; 1st. Because the defendant doth not state, in his rejoinder, that he used all legal means for the recovery of the said 2,500 dollars of Watson, and his indorsor.

2d. Because the defendant does not state that he has not recovered any part of the said 2,500 dollars of the said Watson, or his indorsor, or how much of the 2,500 dollars remains unrecovered of the said Watson, or his indorsor.

3d. Because the defendant is bound to pay one half of the sum that is not recovered of the said Watson, or his indorsor; and if the defendant has not received any part of the 2,500 dollars of the said Watson, or his indorsor, then he is bound, by the condition of the said bond, to pay one half of the sum of 2,500 dollars to the plaintiff.

4th. Because the defendant does not give any answer as to the sum of 500 dollars, stated in the condition of the said bond to have been received by him of the said Watson, before the execution of the said bond.

5th. Because the rejoinder is a departure from the plea of conditions performed.

Upon this demurrer, the judgment of the court being in favour of the plaintiff, the defendant, upon motion, had leave to file an additional plea, whereupon he pleaded, that the whole sum lent to Watson could not be recovered of him or his indorsor, nor could any part thereof be recovered, except the sum of 500 dollars, mentioned in the condition of the bond; by means whereof the defendant became liable and bound to pay to the plaintiff only one half of the said sum which could not be so recovered, and that the defendant paid to the plaintiff's intestate the said one half of the said sum of money which he was liable and bound to pay as aforesaid. To which plea there was a general replication and issue, and verdict for the plaintiff for 2,032 dollars and 75 cents.

On the trial of this issue a bill of exceptions was taken by the defendant below to the opinion of the court, that the plaintiff was entitled, by the said bond, to recover of the defendant the sum of 500 dollars at all events; and that he was also thereby entitled to recover of the defendant the residue of the said 2,500 dollars, if the jury should be of opinion that the defendant could have recovered the same of the said Watson, or his indorsor. And if they should be of opinion that no part of the said residue could have been so recovered, then the plaintiff is thereby entitled to recover of the defendant one half of the said residue, in addition to the said sum of 500 dollars.

Other exceptions were taken at the trial, but were abandoned by the plaintiff in error in this court.

Simms, for plaintiff in error, contended,

1st. That the judgment of the court below, upon the demurrer, ought to have been for the defendant, inasmuch as there was a material variance between the bond produced on *oyer*, and that stated in the declaration; the former bearing date on the 3d day of January, 1799, and the latter being alleged to bear date on the 3d day of October, in the same year.

2d. That the court erred in their construction of the condition of the bond, in supposing that the sum of 500 dollars, mentioned to have been received from Watson, was covered by the penalty, and in instructing the jury that the plaintiff was entitled to recover that sum at all events; and, in addition thereto, a moiety of the balance, if the whole balance could not be recovered by the defendant of Watson, or his indorsor.

1st. On a demurrer, the court must go to the first error in the pleadings. In this case, although the rejoinder is bad, yet the declaration is bad also. If the plaintiff declares on a bond of different date from that produced on *oyer*, advantage may be taken of the variance on demurrer. The plaintiff need not wait till it is produced in evidence. The variance may also be pleaded in abatement. 2 *Salk.* 658, *Holman* v. *Borough*. In the case of *Hole* v. *Finch*, 2 *Wils.* 394, the court said, "that for-

COOKE v. GRAHAM'S ADMINISTRATOR.

merly, when the *whole original writ* was spread in the same roll with the *count* thereupon, if a variance appeared between the *writ* and *count*, the defendant might have taken advantage thereof, either by *motion* in arrest of judgment, writ of *error*, plea in *abatement*, or *demurrer*. But afterwards it was determined, that if the defendant will take advantage of a *variance* between the *writ* and *count*, he must demand *oyer* of the writ, and show it to the court. By the act of *jeofails* of Virginia, *Revised Code*, *p.* 118, § 26, no judgment after verdict shall be staid for the omission of the day, month or year, in the declaration or pleading, (the name, sum, quantity or time, being right in any part of the record or proceeding.) This shows, that before that act, such omission might have been taken advantage of by motion in arrest of judgment.

WASHINGTON, J. Will the principle of going up to the first error, apply to a special demurrer by the adverse party?

Simms. Certainly.

MARSHALL, Ch. J. Can the variance be taken advantage of on a general demurrer?

Simms. Yes. It is matter of substance.

2d. As to the construction of the bond.

By the opinion of the court, the plaintiff was entitled, by the bond, to recover the 500 dollars at all events.

The 500 dollars are only mentioned in the preamble of the condition, which, like that of a statute, has no obligatory effect. It is no part of the condition of the bond, that the defendants should pay that sum. It might have been paid over before, or the intestate may have been satisfied with relying on the defendant's simple acknowledgment that he had received it. The condition is in the alternative, and only one of two things is to be done. 1st. Either to pay over the whole 2,500 dollars, if he could recover it from Watson, or his indorsor—or, 2d. If he could not recover the whole sum, to pay over one half of such sum as he could not recover. There is no obli-

gation, under the bond, to pay over what he had already received. Perhaps the plaintiff may bring an action for money had and received for the 500 dollars. But it is not material how he is to recover it. It is sufficient, in the present case, that its payment is no part of the condition of this bond.

The sum which could not be recovered is capable of being ascertained; and it is now ascertained to be 2,000 dollars. One half of that is the sum which the defendant agreed to lose. It is, therefore, the same as if the condition of the bond had been to pay the sum of 1,000 dollars.

But if no part of the money lent could be recovered of Watson, or his indorsor, then the defendant could not be bound to pay more than the one half of the whole sum, which is only 1,250 dollars. In no case is he bound *by the bond* to pay more than that sum; and yet the jury have given the plaintiff 1,500 dollars, with interest thereon, from the date of the bond.

E. J. Lee, contra, admitted the general rule, that upon a demurrer, the court is to look for the first error, and give judgment accordingly; but that, in this case, the state of the pleadings makes a difference. The declaration was filed in due time, and a *profert* made. A judgment was obtained against the defendant, in the office, for want of a plea. This judgment was set aside by the defendant's appearance and entering a general demurrer, which was afterwards withdrawn, and a general performance of the condition of the bond pleaded. By this plea, after *oyer*, he had admitted, that the bond declared on is the same as that produced on *oyer*. And having thus admitted it to be the same bond, the omission of its true date, in one part of the declaration, can only be matter of form. He has not pleaded it in abatement, nor demurred specially. On the plaintiff's special demurrer the defendant cannot take advantage of a *formal* variance; he can only avail himself of it by demurring specially himself. Every thing is form, without which, a right of action appears to the court. Every thing which the court may amend, without altering matter of substance, is aided by a general demurrer. *Sav.* 88. So, every thing which may be amend-

COOKE v. GRAHAM'S ADMINISTRATOR.

ed under the statute, or which would be cured by a verdict, is cured by a general demurrer.

2d. As to the second point, there can be no doubt. The condition of the bond is, that the defendant shall pay the *whole sum so lent*, viz. 2,500 dollars, if it could be recovered by the defendant from Watson. But at the time the bond was executed, the defendant could recover only 2,000 dollars of Watson, in any event, because Watson had already paid 500 dollars. In this case, the 500 dollars is covered by the penalty.

But it is said, that these 500 dollars were not to be paid over unless the defendant recovered the *whole* sum from Watson; or in other words, that the 500 dollars were a premium to the defendant for losing 2,000 dollars of the plaintiff's money. But the *whole* was to be paid over when recovered; the whole includes all its parts; hence every part was to be paid over when recovered.

Simms, in reply.

1st. When a man demurs, he puts every thing to hazard in his own pleadings; and his adversary may take the same advantage as if he himself had demurred.

MARSHALL, Ch. J. As if he had demurred *generally*.

Simms. There is a difference between what a court would amend, and what can be amended under the statute.

2d. As to the condition of the bond.

No man can be compelled, by his bond, to pay more than he expressly agreed to pay. The defendant has only bound himself to pay the whole, in case the *whole* could be recovered. It does not appear that the 500 dollars were not paid or settled in some other way.

March 6.

MARSHALL, Ch. J. delivered the opinion of the court, to the following effect:

The plaintiff declares upon a bond, dated the 3d of October; and upon *oyer*, the bond appears to bear date the 3d of January preceding.

By the *oyer*, the bond is made a part of the declaration. There were several pleadings, and among the rest, a bad declaration, a bad rejoinder, and a special demurrer by the plaintiff to this bad rejoinder. When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon a general demurrer. The variance between the date of the bond declared upon, and that produced on *oyer*, is fatal.

Upon the second point the court is of opinion, that there is no error in the construction given by the court below to the condition of the bond. There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties.

But for the first error, the judgment must be reversed, and judgment entered for the plaintiff in error, on the demurrer.

Judgment reversed, with costs.

CASES

ARGUED AND DECIDED

AT

FEBRUARY TERM, 1806.

The Judges present at this Term, were

THE HONOURABLE JOHN MARSHALL, CHIEF JUSTICE.
The honourable WILLIAM CUSHING,
The honourable WILLIAM PATERSON,
The honourable BUSHROD WASHINGTON,
AND
The honourable WILLIAM JOHNSON,
} ASSOCIATE JUSTICES.

Judge Chase was absent the whole Term, on account of ill health; and

Judge Cushing was prevented, by indisposition, from attending until the 19th of February.

On the 12th of February, 1806, the HONOURABLE JOHN BRECKENRIDGE was sworn as *Attorney General of the United States*, in the place of the HONOURABLE LEVI LINCOLN, resigned.

GENERAL RULE.

FEBRUARY TERM, 1806.

The following Rule was directed to be entered on the minutes of the Court.

ALL causes, the records in which shall be delivered to the clerk, on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases, where a writ of error shall be a *supersedeas* to a judgment, rendered in any circuit court of the United States, (except that for the district of Columbia) at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error, to lodge a copy of the record with the clerk of this court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner, as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the district of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or so

soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

DOBYNES & MORTON v. UNITED STATES.

To support a judgment on a collector's bond, at the return term, it must appear, by the record, that the writ was executed fourteen days before the return day.

THIS writ of error came up at last term from the district court of the United States for the Kentucky district, which, by law, has the jurisdiction of a circuit court of the United States.

The suit was originally brought by the United States against Lewis Moore, as principal, and Dobynes and Morton, as sureties, in a bond given by Moore, as a collector of the revenue.

The writ of *capias ad respondendum* was issued on the 12th of February, 1803, returnable to the 2d Monday of March following; and judgment was recovered by default, at the return term, on motion.

The error insisted upon was, that it did not appear, by the record, that the writ had been "executed fourteen days before the return day thereof," according to the 14th section of the act of congress, of July 11, 1798, *vol.* 4, *p.* 197.

The record contained a copy of the bail-bond given by Morton, dated the 11th of March, 1803; and a receipt from the jailor, for the body of Dobynes, dated the 12th of March, 1803.

The 2d Monday of March could not have been later than the 14th of the month.

DOBYNES & MORTON v. THE UNITED STATES.

Mason, for the United States, suggested diminution in this, that the writ was served on Dobynes and Morton, on the 20th of February, as appeared by the record of the district court; and obtained a *certiorari*.

But now, at this term, the return of the *certiorari* not showing any thing more than what appeared on the first transcript,

Breckenridge, attorney-general, admitted that the judgment could not be supported, as there was nothing in the record by which the return of the marshal could be amended, so as to show, that the writ had been executed fourteen days before the return day.

C. Lee, for the plaintiffs in error.

Judgment reversed.

HANNAY v. EVE.

HANNAY v. EVE.

The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war.

THIS was a writ of error to the circuit court of the United States, for the district of *Georgia*, sitting in chancery, to reverse a decree which dismissed the complainant's bill on a demurrer.

The complainant, as assignee of *Cruden and Company*, alleged, in his bill, that on the 24th of December, 1782, during the war between the United States and Great-Britain, the British armed ship *Dawes*, owned by *Cruden and Company*, who were British subjects, and commanded by *Oswell Eve*, the defendant, sailed with a cargo, the property of *Cruden and Company*, from Kingston, in Jamaica, for New-York, then in possession of the British troops. That on her passage the ship met with much tempestuous weather, by which she was rendered incapable of reaching her port of destination; in consequence of which, the defendant, after

The duty of a master of a vessel, to his owners, will not oblige him to violate the good faith; even of an enemy, in order to preserve his ship, nor to employ fraud, in order to effect that object.

consultation with the crew and passengers, came to the determination to sail for the nearest port in the United States, thereby to save the lives of the crew and passengers, which were in imminent danger, and also to save as much as possible to the owners. That the vessel and cargo were liable to be captured by the cruisers of the United States; or if she went into any port of the United States, without being captured, she would become a *droit* of admiralty to the United States, or some of them. That the defendant stated to the crew and passengers, that as congress, by their resolve of the 9th of December, 17 1, had enacted and declared, "That all ships and vessels, with their cargoes, which should be seized by the respective crews thereof, should be deemed and adjudged as lawful prize to the captors," as the vessel was incapable of reaching New-York, and as she would be totally lost to the owners, to himself, and the crew, if captured by the cruisers of the United States, the best mode would be, to seize and capture the vessel and cargo, make the passengers, who were military men of high rank and distinction, prisoners of war, and sail for the nearest port, and there obtain a condemnation of the vessel and cargo, for the benefit and compensation of the crew, who would lose their wages, if she was regularly captured, and that the residue should remain in the defendant's hands, as agent and trustee, and for the sole use and benefit of the owners. That this plan was agreed to, and executed: and an agreement, signed by the defendant and the crew, ascertaining what share each man was to be allowed, and which was to be the basis of the judge's decree, as to the distribution of the prize-money. That the crew consented to the defendant's having a larger share than they would, if he had not declared his intention to act in the whole, as the agent and trustee, and for the benefit of the owners. That the vessel was accordingly carried into a port in North-Carolina, libelled, condemned, and distribution made, according to the proportion fixed by the agreement. That the defendant afterwards purchased a number of the shares of the seamen, for the benefit of his owners; that he also purchased part of the cargo, at the marshal's sales, and shipped it to Charleston, where he sold it to great profit, for the benefit of the owners.

HANNAY v. EVE.

The bill then prays a discovery, and that the defendant may account, and be decreed to pay, &c.

To this bill the defendant demurred, and assigned two causes of demurrer.

1. That it appears by the complainant's own showing, that the ship and cargo were regularly condemned under the resolve of congress, of the 9th of December, 1781, as lawful prize, and the proceeds decreed to the defendant, and others, as lawful captors, the legality of which decree ought not now to be called in question.

2. That the bill contains no matter of equity, but what is cognizable at law.

Upon argument, the judge (Stephens) sustained the demurrer, and dismissed the bill, but without costs.

P. B. Key, for the plaintiff in error. The principal question is, whether the complainant has equity.

If Eve had given up the ship for his own benefit, it would have been an act of barratry, a breach of trust, and the owners would have had a right of action at law against him, for his misfeasance. But they may, if they please, affirm his surrender of the vessel, and oblige the defendant to account.

If there is any impediment to the relief sought, it must be grounded on the resolve of congress; for if the owners had a right of action at law, it was saved by the treaty of peace.

The master was always under a moral obligation to account, whatever protection he might derive from the resolve of congress, which gave the whole ship and cargo as prize. There being then a moral obligation, sufficient to support a promise, so as to prevent it from being *nudum pactum*, and an express promise charged in the bill, and confessed by the demurrer, there is nothing wanting to entitle the complainant to the relief he asks. It is true, that the promise was made to the crew, yet it enures to the benefit of the owners. Should

it be said that the promise was *in fraudem legis*, the answer is, that it was a *stratagem of war*, and, therefore, justifiable. In *foro conscientiæ*, it was as justifiable to evade as to enforce such a law; and if it was a fraud against the law of congress to receive the proceeds of the ship and cargo, for the use of the owners, it was equally a fraud against the owners, to persuade the crew to carry the vessel into a port of the United States, under a pretence of saving the property to the owners, and afterwards to take the whole proceeds to his own use.

Harper, contra. The ordinance of congress of 4th December, 1781, (*7 vol. journals of congress, p.* 243) it is true, authorised mutiny and treachery, but it was only a law of retaliation. The British had adopted a similar provision; and congress found it necessary to retaliate.

The facts stated by the complainant, in his bill, are such as show the necessity of delivering up the vessel, and that she was absolutely lost to the owners.

The bill states expressly, that she was incapable of reaching her port of destination; that she must either founder or be captured, or voluntarily run into an enemy's port. It justifies the conduct of the master, in giving up the vessel, but grounds its claim to relief, either upon a supposed moral obligation of the defendant, (resulting from his duty, as master of the vessel) to do every thing in his power for the benefit of the owners; or upon an express promise made to the crew, which, it is contended, enures to the benefit of the owners; or upon an allegation of an imposition upon the crew, to induce them to consent to deliver up the vessel.

As to the first ground, the master's duty did not oblige him to violate the laws of another country, especially of that country to whose laws he applied for protection and relief. His duty to his owners ceased, when he could no longer preserve the property by fair and honourable means. His duty could never oblige him to commit a fraud upon the good faith even of an enemy.

HANNAY v. EVE.

The second ground is that of an express promise to the crew. This is liable to three objections. 1st. That it is a promise without consideration, and, therefore, *nudum pactum*. 2d. That it is not made to the owners—and, 3d. That it was *in fraudem legis*.

The third ground of claim is that of imposition upon the crew, to induce them to give up the vessel. This, if it can be the ground of claim by any person, must be that of a claim by the crew, or some of them, to set aside the agreement for the division of the prize-money, and cannot be a ground of claim by the complainant. It is also liable to the objection, that the courts of the United States can never sanction a claim, grounded upon a fraud upon the laws of the United States.

The owners, by affirming the transaction, and calling upon the defendant to account, have made themselves a party to the fraud; and the maxim of law applies, *in pari delictu melior est conditio possidentis*.

To show the extent of the principle, that contracts *in fraudem legis* were void, he referred the court to the following authorities. *Plowden's Commentaries*, 75. 1 *Domat*, 145. 2 *Bac. Ab.* 582. *Cowper*, 39, 342. 1 *T. R.* 734. 1 *Atk.* 352. 2 *Atk.* 136. *Buller*, 146. 2 *P. Williams*, 134, 347, 350. 3 *T. R.* 454.

Key, in reply. The foundation of this bill is the original trust, before the agreement with the crew. It was a violation of that trust to give up the ship. The defendant was bound to do all in his power to protect the property. If he has been guilty of a fraud upon the United States, the owners were not a party. The fraud of which the plaintiff complains is, that the defendant induced the crew to give up the ship, under the idea of doing it for the benefit of the owners, and then turning round, and pleading the resolve of congress against the claim of the owners.

But if that resolve was a bar, a subsequent acknowledgment of the original trust, and a promise to account, will again set it up.

February 13.

MARSHALL, Ch. J. delivered the opinion of the court.

The essential difficulty in this cause, arises from the consideration, that under the resolution of congress, by which the vessel and cargo mentioned in the proceedings were condemned, a sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice.

It has been correctly argued by the plaintiff in error, that the captain was under obligations to the owners, from which, in a moral point of view, he could not be completely absolved. He was bound to save for them the ship and cargo by all fair means within his power; but he was no bound to employ fraud in order to effect the object. The situation of the vessel unquestionably justified her being carried into the, the port of an enemy, and, perhaps, in the courts of England, the libelling of the vessel, by the captain and crew, might be construed to be an act which would enure solely to the benefit of the owners; but war certainly gives the right to annoy an enemy by means such as those which were employed by congress, and courts are bound to consider them as legitimate, and to leave to them their full operation.

The agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a *stratagem* which the laws of war would authorise, but it was certainly a fraud upon the resolution of congress, and no principle can be more clear, than that the courts of the United States can furnish no aid in giving efficacy to it. Congress having a perfect right, in a state of open war, to tempt the navigators of enemy-vessels to bring them into the American ports, by making the vessel and cargo prize to the captors, the condemnation of a vessel so brought in amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the owners, and of their

HANNAY v. EVE.

claim upon the captain. Had no communication taken place between the captain and his crew, whereby a portion of the prize-money was allotted to him in trust for the owners, which would not have been allotted to him as a captor, in virtue of his station in the vessel, it would have been a plain case of prize under the resolution of congress, and any intention under which the capture was made, whether declared or not, would have been, like other acts of the will, controulable and alterable by the persons who had entertained it. But if, by a contract with the crew, stipulating certain advantages for the owners of the ship and cargo, the vessel has been carried in when she would not otherwise have been carried in, or a larger proportion of the prize has been allowed to the captain than would have been allowed to him for his own use, a plain fraud has been committed by him, and the question, whether the trust which he assumed upon himself, and under which he obtained possession of the property, can be enforced in this court, is one of more difficulty, upon which a difference of opinion has prevailed. It has been thought by some of the judges, that the contract being in itself compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation, which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion, that the contract being clearly in fraud of the law, as existing at the time, a law to which, under the circumstances attending it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country, to evade whose laws it was made. The person in possession must be left in possession of that which the decree of a competent tribunal has given him.

This opinion seems completely to decide the point made under the treaty of peace. According to it, a debt never existed to which the treaty could apply. No debt was due from the captain to his owners, but in virtue of the confiscation of the ship and cargo, and it has never been alleged, that the treaty extended to captures made during the war, of property in the actual possession of the enemy, whatever might be the means employed in making them.

If the allegations of the bill had stated any contract subsequent to the condemnation, by which captain Eve had made himself a trustee, the previous moral obligation might have furnished a sufficient consideration for that contract. But the allegations of the bill are not sufficiently explicit on this point. They do not make out such a case. His declarations appear to have been cotemporaneous with the transaction, and only to have manifested the intention under which he acted, an intention which he was at liberty to change.

Judgment affirmed.

MONTALET v. MURRAY.

If the plaintiff in error does not appear, the defendant may either have the plaintiff called, and dismiss the writ of error, with costs, or he may open the record, and pray for an affirmance.

MARSHALL, Ch. J. stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance.

P. B. Key, for defendant, had the plaintiff called.

Dismissed.

The Chief Justice also stated, in answer to a question from the clerk, that, in such cases, *costs go of course.*

SARAH AND ABIGAIL SILSBY, v. THOMAS YOUNG AND ENOCH SILSBY.

D. devised all his estate to his executor in trust, to convert the same into money, and after payment of debts, to in-

THIS was a writ of error to the circuit court of the United States for the district of Georgia, to reverse the decree of that court, which dismissed the bill of the complainants, Sarah and Abigail Silsby.

Daniel Silsby, the brother of the complainants, and uncle of the defendant, Enoch Silsby, being seised and pos-

S. AND A. SILSBY v. YOUNG AND SILSBY.

sessed of real and personal estate in England and in the state of Georgia, by his will, made in England, on the 11th of January, 1791, devised all his estate to his executor W. Gouthit, of London, in trust to turn the same into money, or securities for money, and after payment of his debts, to place out the surplus upon any public or private securities upon interest, or to invest it in the public funds.

He then bequeaths to his nephew, Enoch Silsby, 1,500*l.* sterling, to be paid to him at 21 years of age "*subject to the provisoes hereinafter mentioned*," and directed the interest to be paid to his guardian during his minority, to be applied to his maintenance and education.

He then directs his trustee to set apart 1,000*l.* sterling, and pay the interest thereof to his sister *Sarah*, during her life, for her sole and separate use and disposal, and in case of her death without issue, the principal was to be paid over to *Enoch*. A similar provision was made for his sister Abigail, the other complainant. And after bequeathing several other pecuniary legacies, he uses the following words: "Provided always, and I do hereby expressly declare it to be my will and meaning, that in case the personal estate, and the produce arising from the real estate which I shall die seised and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the said annuities and legacies so by me given and bequeathed, shall not abate in proportion; but that the whole of such deficiency (if any there shall be) shall be deducted out of the said sum of one thousand five hundred pounds herein before by me bequeathed to my said nephew, Enoch Silsby.—And in case the personal estate, and the produce arising from the sale of the real estate, which I shall die seised and possessed of, shall be more than sufficient to answer and satisfy the several annuities or legacies herein before by me bequeathed, then, and in such case, I give and bequeath the surplus and residue which shall so exceed the purposes of this my will unto my nephew, Enoch Silsby, subject to such conditions as are herein before in this my will mentioned, and contained, touching and concerning the said sum of one thousand five hundred pounds sterling, so by me bequeathed as is herein before particularly mentioned."

vest the surplus in the funds, or put it out on interest. He then bequeaths 1,500*l.* to *E.* to be paid at the age of 21, subject to the subsequent provisoes; and directs 1,000*l.* to be set apart, and the interest to be paid to *S.* during her life, and after bqueathing other pecuniary legacies, says, provided "that in case the personal estate, and the produce arising from the real estate which I shall die seised and possessed of, *shall not be sufficient* to answer the said annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the said annuities and legacies so by me bequeathed shall not abate in proportion;

The testator died at Ostend on his way to the United States, in February, 1791, leaving real and personal estate more than sufficient to pay all the debts and legacies, and which came to the hands of Gouthit, the executor, who paid all the debts and all the legacies, excepting those bequeathed to the complainants, and to the defendant, Enoch Silsby, and another legacy of 500*l.* to Daniel Silsby Curtain; but upon these he regularly paid the interest until the year 1796, when he became bankrupt.

The testator in his will mentions that he has in the hands of Harrison, Ansty and Co. of London, 5,000*l.* sterling, for which they allow him an interest of 5 per cent per annum.

Gouthit, in his letter to the complainants of Sept. 7, 1791, says, "I have an excellent offer—a mortgage for 2,000*l.* which, if you think well, I will take it: for if I should at any time see well to place it any where else, by giving six months notice it would be paid. It is on an estate in Manchester, one of the greatest trading towns in this kingdom, and I can make you 5 per cent sterling on it, which will, you know, be 50*l.* a year for each of you, and you may have it paid as you please, but every six months I think would be best. The gentleman I mean to lend the money to is an old acquaintance of your brother's, and the estate is worth 5,000*l.* He does but want 2,000*l.* so you know nothing can be safer on earth, and I will have the deed so recited as to set forth the money is for your use, &c. This, I doubt not, but will meet your approbation. I have taken no money out of Harrison's hands, nor even interest, as I have no doubts of its safety, and the interest is going on."

In answer to which the complainants write him on the 1st of Feb. 1792, "Yours of September the 7th, you mention an old friend of our dear brother's wanting to hire the 2,000*l.* on mortgage. We would willingly oblige him, but cannot. We choose to let it remain just as our brother left it, and shall draw on you every six months for our interest."

but the whole of such deficiency (if any there shall be) shall be deducted out of the 1,500*l.* bequeathed to *E.*" whom he also makes his residuary legatee. The estate was more than sufficient, *at the time of the testator's death*, to pay all debts, annuities and legacies, but afterwards, *by the bankruptcy of the executor*, became insufficient—held that *E.'s* legacy of 1,500*l.* should be liable to *S.'s* annuity.

S. AND A. SILSBY v. YOUNG AND SILSBY.

Gouthit, before his bankruptcy, drew all the money out of the hands of Harrison, Ansty and Co. who were, and always have been, solvent, and in good credit. He never placed out in any specific funds, the 2,000*l.* from which the complainants' annuities were to arise.

On the 20th December, 1791, Gouthit sent a power of attorney to the defendant, Thomas Young, of Savannah, in Georgia, to collect the effects of the testator in that state, under which power Young obtained letters of administration with the will annexed, and took into his possession all the property there, some part of which he paid over to Gouthit. He also, in the year 1800, paid the legacy due to Daniel Silsby Curtain, and part of the 1,500*l.* legacy to Enoch Silsby. Considerable debts due to the estate are still outstanding in Georgia.

At the time of Gouthit's bankruptcy he was indebted to the estate of his testator in the sum of 5,380*l.* 12*s.* 2*d.* sterling, but the commissioners refused to admit him as executor of the testator to prove the same as a creditor of his own estate, whereupon the legatees, who had not been paid, petitioned the Lord Chancellor of England, that Gouthit might be so admitted to prove the debt for their benefit, which his Lordship decreed accordingly; and a dividend of 403*l.* 10*s.* 10*d.* sterling was received by the accountant-general of the court of chancery, but no part of that sum has been received by the complainants.

Enoch Silsby filed a bill in equity in the circuit court of the United States, for the district of Georgia, against Young, to compel him to account, and pay over to him, as residuary legatee, all the estate remaining in the hands of Young.

The complainants, Sarah and Abigail, filed the present bill in equity in the same court against both Thomas Young and Enoch Silsby, praying that Enoch's legacy of 1,500*l.* may abate in favour of their legacies, and that they may charge the residue of the estate for the balance, and have their 2,000*l.* placed out on good security according to the will, and that they may be paid the arrearages of their annuities out of the 1,500*l.* legacy,

and out of the residue of the estate which came to the hands of Young.

The judge below (Judge Stephens) dismissed the present bill, and decreed, that Young should account to Enoch Silsby, upon the other bill in which Enoch Silsby was complainant, and Thomas Young defendant.

Morsell, for plaintiffs in error.

1st. If the plaintiffs have not discharged the general funds, they are entitled to the relief they pray for.

2d. They have not discharged those funds, nor relinquished their claim upon the whole estate of the testator.

It is true, that if one legatee, by diligence, has got his legacy, he shall not be obliged to refund, in case of a subsequent waste of effects by the executor; but that is only where all the legacies are payable at one time, and the legatees are in a capacity to compel the payment of their legacies.

In the present case, the principal of the legacies to the complainants, was not to be paid to them. The testator had directed his executor to *set apart* 2,000*l.* sterling, and to pay the interest only, to the complainants during their lives. It was, therefore, a bequest of an annuity merely. There was nothing for the complainants to do. They had no right to designate the funds, which should be set apart by the executor, in whom alone was vested the right and the power to make the appropriation. By the words of the will, if the estate should not be sufficient to pay all the legacies, yet the complainants were not to suffer. But the defendant, Young, having paid some of the legacies in full, has thereby admitted assets for all. The complainants having regularly received their annuities to the year 1796, when Gouthit, the executor, became bankrupt, had no right to complain, and had no reason to press for a specific appropriation of the money, from which their annuities were to be paid. They knew that the whole estate stood chargeable to them

S. AND A. SILSBY v. YOUNG AND SILSBY.

until their 2,000*l.* were set apart, according to the directions of the will. The residuary legatee cannot avail himself of a breach of trust by the executor, to the injury of the complainants, who claim under the same trust. The executor was not bound by the will to give any security, nor could the complainants call upon him therefor.

The time at which the estate should be insufficient to pay all the legacies, so as to enable the complainants to call upon the residuary legatee, is not designated by the will in express terms; but it is clear, that the time of the death of the testator, was not the time he contemplated; because, after directing his executor to sell his real estate, he says, "in case the personal estate, *and the produce arising from the real estate, which I shall die seised and possessed of*, shall not be sufficient," &c. thereby contemplating a period after his death, and sufficiently distant to enable his executor to sell the real estate. The words of the will are "sufficient to answer *the said annuities*." *How* long? The answer is obvious; as long as the annuities are to be paid, which was during the lives of the complainants. The residuary legatee was, therefore, to answer for the insufficiency, if it happened at any time during their lives.

The case of *Marsh* v. *Evans*, 1 *P. Will.* 668, is very similar to the present. The testator gave to each of his two sons, and to his daughter, 2,000*l.* a piece, "with a proviso, that if his assets shall fall short for the payment of these legacies, still the daughter shall be paid her full legacy, and that the abatement shall be borne proportionably out of the sons' legacies only." "The testator left sufficient to pay all the legacies, but the executrix wasted the assets, and by that means only, a deficiency happened."

The master of the rolls decreed, that the daughter should abate equally with the sons. But the Lord Chancellor reversed the decree, and directed, that the daughter should have her full legacy, and that the abatement should be out of those of the sons only.

It is unimportant to the complainants by what means the assets became insufficient, inasmuch as the testator intended to secure their annunities at all events. It was the testator, and not the complainants, who trusted the executor.

The legacy of 1,500*l.* to Enoch is (as far as the complainants are concerned) to be considered as a residuary legacy; because, by the express words of the will, it is placed upon the same ground; and nothing can be taken by the residuary legatee, until all the debts and particular legacies are paid. 2 *Ld. Raym.* 1320. *Spendlove* v. *Aldrich.*

The case of *Orr* v. *Kaines*, 2 *Vez.* 193, shows, that it is an established rule, that if an executor pays one legatee in full, he thereby admits assets to pay all the others.

2d. The complainants have not, by any act, waived their right to come upon the whole estate, nor forfeited that right by any *laches.*

The letter of February, 1792, is a mere refusal to sanction any thing not required or directed by the will. The complainants say, that they choose to let it (i. e. the 2,000*l.* provided by their testator as a fund for the payment of their annuities) remain just as the testator left it. It is not even a hint that they meant to rely on the money in the hands of Harrison, Ansty & Co. and if it was, yet they had no power to prevent the executor from drawing those funds out of the hands of that house; nor did it have that effect, for Gouthit did actually withdraw them, and apply them to other purposes.

The complainants were not bound to call upon the executor to designate the funds set apart for the payment of their annuities; and as long as they were regularly paid, they had no cause to suspect the solvency and the honesty of Gouthit, on whom their testator had chosen to bestow his confidence. They cannot, therefore, be charged with *laches.*

S. AND A. SILSBY v. YOUNG AND SILSBY.

Harper, for the defendant, Enoch Silsby, contended;

1st. That as the estate was sufficient at the time of the testator's *death*, and became insufficient, long afterwards, by the default of the executor, the contingency has not happened upon which the will renders Enoch Silsby's legacy of 1,500*l.* liable solely to abatement; and that he is, therefore, entitled to receive the whole; or, at most, is liable only to an abatement, *pro rata*, with the other legatees.

2d. That the complainants, by their acts, made their election to depend on the estate in England, and on the security of Gouthit, and, therefore, cannot resort to the residue in this country.

3d. That if their acts do not amount to such an election as will preclude them from resorting to the residue, yet their *laches*, in omitting to take steps for compelling the executor to place out their legacies on public or private securities, according to the will, ought to have that effect.

The complainants were of full age at the time of making the will. The defendant, Enoch Silsby, was an infant for a long time after the testator's death. There is a limitation over to Enoch of the principal sum of the complainant's legacies. By their conduct he has lost the reversion of the 2,000*l.* and of 1,200*l.* the surplus. It is not just that the loss should fall upon him who was then an infant. The claim of the complainants would sweep every thing from Enoch, who was the peculiar object of the testator's bounty. The defendant, Young, must take the consequences of his own act, if he has paid any of the legatees in full. He is solvent, and having, by his act, admitted assets, the complainants cannot resort to the residuary legatee.

But the testator died possessed of estate enough to pay all the debts and legacies; and, therefore, Enoch's legacy of 1,500*l.* by the terms of the will, is not bound to abate.

If the testator meant to give the complainants their legacies at all events, he would have said so. He knew that he had enough to pay all at the time of making his will, but accidents might happen before his death, and it was to guard against those only, that he provided for the case of insufficiency.

There is a great difference between this case and that of *Marsh* v. *Evans*, cited from 1 *P. Will.* 668. In that case the proviso was, that "*if his assets* should *fall short.*" The word *assets* is technical, and refers to the estate *after* his death. The legacies were not payable until his children should be of full age, and the whole expression evidently alludes to a state of things which might happen, at any time between his death and the time when the legacies would become payable.

But in the present case, the testator meant to refer to the time of his death; if there should then be an insufficiency to pay all, Enoch's 1,500*l.* should abate, but not otherwise.

The anonymous case in 1. *P. Will.* 495, establishes the rule, that if one legatee, by diligence, obtains his legacy, and the executor having had sufficient assets, wastes them, and occasions a deficiency, the legatee shall not be obliged to refund.

In the case of *Walcot* v. *Hall*, 23d February, 1788, 3d *vol. of Supplement to Viner*, *p.* 432, the distinction is taken between a deficiency at the time of the death, and that which arises afterwards.

The case of *Orr* v. *Kaines*, 2 *Vez.* 194, shows, that where there was an original sufficiency of assets, and the executor remains solvent, the legatees shall not refund.

As Young is solvent, the complainants cannot oblige the other legatees to refund, unless there was an original deficiency of assets.

S. AND A. SILSBY v. YOUNG AND SILSBY.

2d. As to the acts of the complainants.

Their letter to Gouthit prevented the 2,000*l.* from being put out on security. It is, therefore, the same thing, in effect, as if the executor had, at their request, put it out on a security which had failed.

But they have actually made choice of the security. They knew the money was in the hands of Harrison, Ansty & Co. and in their letter they say, "we choose to let *it* remain just as our brother left it;" that is, in the hands of Harrison, Ansty & Co. After having done that, Gouthit remained their agent for the purpose of drawing and remitting the interest. They were the only legatees who were of age, and capable of assenting to such a disposition of their legacies. The other legatees were infants. If the complainants had directed the 2,000*l.* to remain in the hands of the executor, and he had failed, they must have sustained the loss. By refusing his offer to place it out on mortgage, they have, in effect, assented to his retaining it, and he having failed, they must submit to the consequence. If they had assented to his offer, the money would have been safe, and the defendant, Enoch, would not have lost his chance of the reversion. If the executor himself had placed it out on security, and set it apart, according to the directions of the will, and it had been lost, they could never have called upon the residuary legatee.

3d. But the complainants have been guilty of *laches*, in not compelling the executor to place out the money on security. They had early notice of the will, and took no measures to have their legacies secured, until the failure of Gouthit, which was six years after the testator's death. By this neglect, Enoch has lost his reversion. He was a minor, and, therefore, no *laches* can be imputed to him.

P. B. Key, for the defendants.

1st. As to Young.

He considers himself as a stake-holder only. If the complainants are entitled to be first paid, he holds for them; if not, then he holds for the defendant, Enoch.

If there is an original deficiency of assets, and one legatee receives the whole of his legacy, the others may compel him to refund, and the executor will not be obliged to pay the other legatees in full. So, if an executor pay one in full, by mistake, it shall not preclude him from alleging a defect of assets.

There is no case in which an executor has been thus precluded, by a payment in full, to one of the legatees. The case from 2d *Vez.* 194, was where the executor had not only paid one in full, but had neglected to make an inventory.

2d. As to the defendant, Enoch Silsby.

The general principle is admitted, that specific pecuniary legatees are to be first paid; and that, if there is not sufficient to pay the whole, they must abate in proportion.

This will appears to have been drawn by able counsel. If the testator meant that the particular legacies should have been paid out of the whole estate, he would have said so; but he has directed *a particular fund* to be set apart, out of which the annuities of the complainants were to be paid. If this fund had been set apart, as directed by the will, the defendant, Enoch, would have been entitled to the residue, and exonerated from all liability to refund. The complainants were the only legatees of competent age to compel the executor thus to set apart the fund; or, at least, they were the only legatees to whom *laches* can be imputed. They not only neglected to do this, but, by their letter, prevented the executor from doing it.

The residuum was to abate upon the same contingency only, upon which the legacy of 1,500*l.* was to abate; and that contingency never happened. "The personal estate, and the produce arising from the real estate, of which the testator died seised and possessed,"

S. AND A. SILSBY v. YOUNG AND SILSBY.

was "sufficient to answer all the debts, annuities, and legacies."

If the time of the testator's death was not the time when the sufficiency of the estate was to be ascertained, yet, if at any time afterwards, the personal estate and the produce of the real estate, which came to the hands of the executor, was sufficient, the right of the complainants to come upon Enoch's legacy of 1,500*l.* and upon the residuum, ceased. It was then incumbent upon the complainants to look to their own legacies, and get them properly secured; if they did not, they gave personal credit to the executor, and if he wasted the estate and became insolvent, they must suffer the loss. They had a right to require security in chancery. It is a part of the regular chancery jurisdiction to compel such security, and no suggestion of a *devastavit* was necessary. The funds in England were more than sufficient to pay all the debts and legacies. It was not necessary to wait for the settlement of the estate in Georgia. Young, the administrator in Georgia, never had a sufficiency of assets; and, therefore, his payment of one legacy in full, if that is the fact, cannot bind him to pay all the rest.

Martin, in reply. The question is, whether, if upon an account against the defendants, any funds shall be found in their hands, we are entitled to recover.

They contend, that we are not entitled to an account.

The will speaks of the *produce* of the estate, and not of the estate itself; contemplating the intermediate acts of the executor; looking forward to subsequent events, and negativing the idea, that the testator was contemplating only the situation of his estate at the time of his death. He directs all his estate to be turned into cash, and his debts to be collected, and the whole vested in funds.

The principle of abatement was not to take place until the legacies were to be paid.

The complainants were not bound to elect any particular fund. They had a right to look to the whole estate.

The word "*it*," in their letter to the executor, evidently refers to their legacy of 2,000*l.* and not to any particular sum in the hands of Harrison, Ansty & Co. That letter did not influence the conduct of the executor, for he did not leave the money in the hands of those merchants. If he had done so, and they had failed, there might have been some plausibility in the argument.

The complainants were not bound to apply to chancery to compel the executor to give security. Until the year 1796, they had no reason to complain, and no cause for suspicion. The testator had placed confidence in the executor, and had left it entirely to his discretion, when, and in what manner, he should place the money out on security; consequently, there was no *laches* on the part of the complainants.

February 13.

MARSHALL, Ch. J. delivered the opinion of the court.

This being a suit in chancery, brought by legatees claiming an account, in order to the payment of their legacies, and their bill having been dismissed without an account, the decree can only be supported, by showing that there are, in the hands of the administrator, no assets which ought to be applied to the purposes prayed in the bill.

The testator having bequeathed to each of his two sisters, Sarah and Abigail, who are the complainants, the interest on one thousand pounds sterling, and that being in arrears; and assets having come to the hands of his representative, the complainants are certainly entitled to an account, unless they have forfeited all pretensions to their legacies.

S. AND A. SILSBY v. YOUNG AND SILSBY.

The defendants say they have forfeited their rights,

1st. By a letter, selecting a particular debt in satisfaction of their legacy, which debt is lost.

2d. By their *laches*.

The better to understand the correspondence, which is relied upon, it must be recollected, that, by the will, the whole estate, real and personal, of the testator, was devised to executors and trustees, who were directed to place it out on public or private security, in such manner as should, *in their judgment*, best promote the interests of the legatees. The testator then directs, among other bequests, that his trustees shall set apart one thousand pounds sterling, for each of his sisters, the interest of which shall be paid to them during their natural lives, after which, the principal is to be divided between the children of each, if they should marry and have children, but is given to his nephew, Enoch Silsby, in the event of the first legatees' dying unmarried, or without children.

This duty of the executor and trustee, being thus plainly marked, he addressed a letter to the legatees, in September, 1791, in which he mentions an offer which had been made him, of a mortgage of 2,000*l.* the amount of the sums to be set apart for them, which he will take, if it meets their approbation. If the plaintiffs had taken this mortgage, and the title had proved defective, or the mortgaged property had been destroyed, they would, most probably, have forfeited all claims upon the estate of their testator, and would have been, at least, censured by the legatee in remainder, for having destroyed, by an improvident intervention in the management of the estate, his right to the principal sum, on their dying unmarried. Such an interference, on their part, was unnecessary, because the executor was authorised, by the will, to place the estate either on private or public security, as he should think most advantageous, and would have been particularly indiscreet, because they could neither judge of the validity of the title, nor of the value of the premises proposed to be mortgaged. To have intermeddled

with the subject would, therefore, have been in them a departure from propriety and common prudence, not to be accounted for, nor justified.

Under these circumstances, they say, "You mention an old friend of our dear brother's wishing to hire the 2,000*l.* on mortgage. We would willingly oblige him, but cannot. We choose to let it remain just as our brother left it."

To the court it seems, that this letter will admit of but one construction. It is a plain declaration, that they do not mean to intermeddle with the duties of the executor, but to leave him to perform them according to the directions of his testator. "We choose to let it," (the legacy of 2,000*l.*) "remain just as our brother left it," is plainly saying, that the legacy must remain on the foundation on which the will placed it. The construction which would convert these words into a declaration, that they chose the debts of their testator not to be collected, and that they chose to take upon themselves the hazard of the solvency of any particular debtor, whose debt should remain outstanding, or of the executor, if he should happen to collect it, is really too violent a distortion of them to be tolerated for an instant.

As little foundation is there for the allegation, that the rights of the complainants have been forfeited by their *laches*. The court can perceive no *laches* on their part. It was not particularly incumbent on them to incur the expense of inquiring into the manner in which the executor performed his trust, with respect to the estate at large. They received their interest regularly, and there was no circumstance to awaken a suspicion that they were in danger. On the residuary legatee, and on his father and natural guardian, it was more particularly incumbent to examine into the conduct of the executor, and though he may be perfectly excusable for not having done so, he cannot throw the loss on others, whose conduct has been perfectly faultless.

S. AND A. SILSBY v. YOUNG AND SILSBY.

The court is, therefore, clearly and unanimously of opinion, that the complainants have not forfeited their rights; and, consequently, that the decree must be reversed, and an account directed.

In considering the principles on which the account is to be taken, the court think it perfectly clear, that the specific pecuniary legacies must be set apart, before the defendant, Enoch Silsby, can be entitled to the residuum. The words annexed to the bequest of the residuary estate, which subject it to the same conditions with the bequest of the 1,500*l.* are understood, by the court, to relate to the condition of payment, at the age of 21, and to the limitations over, in case of the death of the residuary legatee, not to the question of abatement; and a residuum, *ex vi termini*, is that which remains after particular legacies are satisfied.

The court is also of opinion, that if there be not sufficient assets to satisfy all the specific legacies, the loss must fall exclusively on the 1,500*l.* given to Enoch Silsby, until that fund be exhausted.

It has been argued, that the words of the will limit this charge on that legacy to the contingency of an insufficiency of assets at the death of the testator. The words are, "It is my will and desire, that if the personal estate, and the produce arising from the real estate of which I shall die seised and possessed, shall not be sufficient to answer the several annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the annuities and legacies shall not abate in proportion, but that the whole of such deficiency, if any there be, shall be deducted out of the said sum of 1,500*l.* herein before by me bequeathed to my said nephew, Enoch Silsby."

These words have undergone a very critical examination, and it has been contended, that the time at which the sufficiency mentioned in the will is to be determined, is fixed by the testator at his death, in like manner as if the expression had been, "if my estate shall not, at the time of my death, be insufficient," &c. But the words do not appear to the court to demand such an interpretation. The words, "the personal and real estate of

which I shall die seised and possessed," are no more in substance than the words "all my real and personal estate" would have been. They describe the subject, on the insufficiency of which an abatement of a particular legacy is to take place, but not the time when that insufficiency is to be tested. In the opinion of the court, that time is when the will is carried into execution, by the application of the funds to their object. If, when that application is made, a deficiency appears, "then, and in that case" it is, that the abatement is to take place in the specific legacy to Enoch Silsby.

This specific pecuniary legacy, being given to the same person to whom the *residuum* is given, and on the same terms, assumes completely the character of a residuary bequest, and the testator does not appear to have intended to give it any preference over the *residuum*. He seems to have intended certain provisions to his relations, the extent of which were apportioned to his opinion of their necessities, and which he did not leave in a situation to be enlarged or diminished by any incident which might affect the state of his affairs. Should his property be merely sufficient to pay those annuities and legacies, they were to sustain no deduction; should it be ever so much enlarged, they were to receive no increase; but all he might possess, exceeding those specific donations, was to be given to his nephew. His bounty to his other legatees was measured; that to his nephew was not defined. As in every case where specific legacies are first given, so in this, it is the intent of the testator to prefer the specific legatees. There would have been no motive for giving a specific legacy, subject exclusively to abatement in case of deficiency, to the residuary legatee, but for the purpose of providing a fund for his education and maintenance during his infancy. For every other purpose, this particular legacy to Enoch Silsby is to be considered as a part of the *residuum*.

It is not easy to assign a motive in the testator for intending a preference to his specific, over his residuary legatee, in the event of an insufficiency of assets at his death, which would not equally apply to an insufficiency which should take place afterwards. The only motive for this preference which could possibly have existed,

S. AND A. SILSBY v. YOUNG AND SILSBY.

was his wish that, if the fund should not be adequate to pay all his legacies, yet, no deduction should be made from those which were particularly bequeathed. This wish originated in his particular feelings towards his relations, and could not depend on the insufficiency which he provided against taking place at the time of his death, or a few months or years afterwards. If, at the time of his death, his estate had been sufficient, but before it could be collected and applied according to his will, bankruptcies, or any other casualties, had occasioned a deficiency, no reason can be perceived, by the court, for supposing that the contemplation of such a deficiency would have induced him to make a different arrangement of his affairs, from what he would have made had he contemplated a deficiency at his death. And between such a deficiency, and one occasioned by the fault or misfortune of an executor, chosen, not by his legatees, but by himself, the court can perceive no distinction.

It is, therefore, the opinion of this court, that the decree of the circuit court be reversed, and that the cause be remanded to the circuit court, that an account may be taken, in order to a final decree.

Reversed.

DECREE.

This cause came on to be heard, on the bill, answers, exhibits, and other testimony in the cause, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the decree of the circuit court, in directing the bill of the complainants to be dismissed, and that the same ought to be reversed and annulled. And this court doth farther direct and order, that the said cause be remanded to the circuit court, that accounts may be taken of the assets which are in the hands of the defendant, Thomas Young, of the payments which have been made to Enoch Silsby, and of the sums which are due to the complainants, and of such other matters as may be necessary to a final decree.

STRAWBRIDGE ET AL. v. CURTISS ET AL.

STRAWBRIDGE ET AL. v. CURTISS ET AL.

THIS was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction.

If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.

Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont, and upon whom the subpœna was served in that state.

The question of jurisdiction was submitted to the court without argument, by *P. B. Key*, for the appellants, and *Harper*, for the appellees.

On a subsequent day,

MARSHALL, Ch. J. delivered the opinion of the court.

3c 267
74f 324

The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct in-

BRAWBRIDGE ET AL. v. CURTISS ET AL.

terests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.

GORDON v. CALDCLEUGH ET AL.

GORDON v. CALDCLEUGH ET AL.

This court has not jurisdiction upon a writ of error to a *state* court, under the 25th section of the judiciary act of 1789, if the decision of the state court be in *favour* of the privilege claimed under an act of congress.

THIS was a writ of error to the judges of the *court of equity of the state of South Carolina, holden in and for the eastern district of the said state.*

James Gordon, "of the city of Charleston, in the state aforesaid," filed a bill in equity against Caldcleugh and Boyd, "of London, in the kingdom of Great Britain," William Muir, "of Hamburgh," and John Gillespie, George M'Kay, and Joseph Reid, whose residence is not mentioned in the bill. At the return of the subpœna, Caldcleugh, Boyd and Reid, appeared and filed a petition, stating themselves to be aliens, and subjects of the king of Great Britain, and that the complainant was a citizen of the state of South Carolina, and praying that the cause might be removed to the circuit court of the United, according to the 12th section of the judiciary act of 1789. To which petition, Gordon, the complainant, answered, that the prayer thereof ought not to be granted, because Gillespie and M'Kay, two of the defendants, were citizens of the state of South Carolina. But the court, "after observing that the parties defendants to the suit, *residing in this state*, were stakeholders, and not materially concerned in the determination of the cause, ordered that it be transferred to the federal court, agreeable to the prayer of the petition."

The complainant immediately, in the same court, assigned errors, in the following form: "Whereupon the said James Gordon, comes and says, that in the

giving of the final judgment, in the cause aforesaid, upon the construction of the 12th clause or section of the statute of the United States, entitled an act to establish the judicial courts of the United States, passed the 24th day of September, 1789, and 2d section of the 3d article of the constitution of the United States, and the 12th article of the amendment of the constitution, there is manifest error in this, to wit, that the judgment aforesaid was given in form aforesaid, for the said Caldcleugh, Boyd and Reid, upon their petition, for the removal of the said cause for trial, into the circuit court of the United States, to be held for the district of South Carolina, whereas judgment should have been given for the said James Gordon, against the removal aforesaid, and this he is ready to verify."

Caldcleugh, Boyd, and Reid joined in error; and thus the case came up.

The writ of error did not state, that the court of equity, of the state of South Carolina, to the judges of which it was directed, was "*the highest court of equity, of the state in which a decision in the suit could be had,*" so as to bring the case within the provisions of the *25th section of the judiciary act of* 1789, nor did that fact in any other manner appear.

E. J. Lee, for plaintiffs in error.

February 13.

MARSHALL, Ch. J. after stating the case, delivered the opinion of the court.

This court has no jurisdiction, under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is *against* their validity, &c. or where is drawn in question, the construction of any clause of the constitution, or of a treaty, or statute of, or commission

GORDON v. CALDCLEUGH ET AL.

held under the United States, and the decision is *against* the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission.

In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not *against* the privilege claimed under the statute; and, therefore, this court has no jurisdiction in the case.

The writ of error must be dismissed.

M'FERRAN v. TAYLOR AND MASSIE.

M'FERRAN v. TAYLOR AND MASSIE.

He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.

Quere, if the mistake be of a matter deemed perfectly imma-

ERROR, to a decree of the district court of the district of Kentucky, in chancery.

M'Ferran in his bill alleged that on the 19th of March, 1784, the defendant, Taylor, for a valuable consideration, executed his bond to the complainant, for the conveyance of 200 acres of land out of 1,000 acres located by him on *Hingston, or* out of 5,000 acres which Taylor *then had for location.* The condition of the bond was as follows: "that if the said Richard Taylor, his heirs &c. shall well and truly make, or cause to be made, to the said Martin M'Ferran, his heirs or assigns, a good sufficient title in fee simple to two hundred acres of land in the county of Kentucky, out of 1,000 acre tract, located by the said Richard Taylor on *Hingston's fork of Licking; or* 200 acres out of 5,000, which the said Taylor has now for location, provided he obtain the same, at such part or place thereof, as the said M'Ferran shall choose, not to exceed more than twice the breadth in length thereof, so soon as the lands can, in any degree of safety, be sur-

veyed; then this obligation to be void, otherwise to remain in full force and virtue."

The bill further alleged, that on the 25th of September, in the same year, the defendant, Taylor, executed another bond to the complainant for 300 acres of land adjoining the former tract of 200 acres.

That the said 5,000 acres of land alluded to by the bonds, was granted to Taylor, for his military services, by a warrant numbered 1,734, which issued for 6,000 acres; but that Taylor did not inform the complainant that it contained more than 5,000 acres. That 1,000 acres of the 6,000 have been located on *Paint Creek*, and 2,000 on *Brush Creek*, in the north-western territory, and 3,000 on the *Green River*, in the district of Kentucky. That Taylor had not any lands on *Hingston*, so that the complainant cannot make his choice there, where he avers the general quality of the land is equal to any in Kentucky, and is worth from 8 to 10 dollars an acre. That Taylor has sold the 1,000 acres on *Paint Creek* to the defendant, *Massie*, who, before he paid for the land, and obtained a title from Taylor, had notice of the complainant's claim to 500 acres from Taylor, as before stated.

That before the sale to Massie, Taylor had sold the 2,000 acres on *Brush Creek* to Abraham Buford, or to some one else, and in consequence thereof, assigned the certificate of survey to John Brown. That in 1796, the complainant applied to Taylor to show him his lands, that he might make his choice, but Taylor neglected and refused to show them. That the complainant *chooses* to have the 500 acres laid off, and conveyed to him from the land on *Paint Creek*, and has given notice of his choice to Taylor, who refuses to convey the same from out of that tract, and refuses to accompany the complainant to have the same laid off; and that Massie also refuses to convey.

The bill concludes with a prayer, that the complainant may be permitted to make choice of 500 acres of land out of the 1,000 acres on *Paint Creek*; that the defendants may be compelled to convey the same; and that the court would grant general relief, &c.

terial by both parties, at the time of the contract, and of a matter which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?

A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded.

M'FERRAN v. TAYLOR AND MASSIE.

The answer of the defendant, Taylor, admitted the bonds, and that the 500 acres were to be laid off in one tract. It alleged, that the consideration of the first bond was two horses, sold to him by the complainant, at the price of 40*l.* Virginia currency for both; and that the consideration of the other bond was another horse, valued at 48*l.* It refers to the entry for the 1,000 acres upon the waters of *Licking*, dated June 15th, 1780, which is in these words: "Colonel Richard Taylor enters one thousand acres on treasury-warrants, adjoining an entry of Major Thompson's, on a buffaloe road leading from *Hingston's fork* to the sweet licks, beginning at his south-east corner, thence north along said Thompson's line 600 poles, thence east for quantity." The answer then avers, that the mentioning of *Hingston's fork of Licking* in the bond, was not a description of *locality*, but of *tract;* and that the mentioning *Hingston* was no greater recommendation of the land than if another fork of Licking had been named; because both parties were unacquainted with it, and Taylor had understood that his said entry was on Hingston. That the provision in the bond for a choice out of 5,000 acres was an alternative; and it was not intended that the complainant should have his choice out of the 6,000 acre warrant; and it was intended, and understood by both parties, that Taylor should hold 1,000 acres thereof, unincumbered, and not liable to the complainant's choice. It avers further, that these 1,000 acres were located on the shares on *Paint Creek;* that Taylor held part, and Kenton and Helm another part, as locators; that he sold his part to Massie, but he does not recollect the quantity. Of the remaining 5,000 acres he exchanged 2,000 with Colonel Abraham Buford, for two entries of 1,000 acres each, because there was a greater probability of getting good land upon small entries than upon large. That these 2,000 acres were located on the south side of *Green River*. That the other lot of 2,000 acres, part of the 5,000, was located on the *north fork of Paint Creek*, but understanding the land was not good, he had 1,500 acres withdrawn, and finally located on some of the waters of *Paint Creek*, as he is informed; but he is so much unacquainted with that country, that he cannot point it out particularly. The remaining 1,000 acres are located and patented south of *Green River*. That he has offered the complainant a choice of any of those lands, except the 1,000 acres held

by Massie, Kenton, and Helm, which he has refused. That the 500 acres on the north fork of *Paint Creek*, are inferior to the other lands, as he has been informed and believes; and the complainant having positively refused them, Taylor has sold them. But the 1,500 acres on the waters of *Paint Creek*, which were originally part of the 2,000 acre lot, and the three tracts of 1,000 acres each, south of *Green River*, are yet held by him ready for the choice of the complainant. That Taylor informed the complainant, before the commencement of this suit, fully of the exchange with Buford, and has been always ready and willing to let him have his 500 acres as aforesaid. That Taylor informed the complainant of his said military warrant; and that it was for 6,000 acres; and that he reserved 1,000 acres thereof, which it was then possible he might want to live on, and that the complainant's right of choice was only to extend to the remaining 5,000 acres. That since Taylor discovered, that the first mentioned 1,000 acres laid on *Slate Creek*, a branch of *Licking*, and not on *Hingston*, a branch of Licking, he informed the complainant thereof, and also that he had no lands on Hingston.

The answer of Massie denied, that previous to his paying the consideration of the land to Taylor, and the issuing of the patent, he had any notice that the complainant had any claim to that land, and averred that he was a *bona fide* purchaser, for a valuable consideration, without notice.

The jury (who, by the practice of Kentucky, are called to ascertain facts in chancery suits) found the following facts:

1. That the defendant executed the bonds.

2. That at that time he had no lands on *Hingston's fork of Licking*.

3. That on the 29th of August, 1795, he assigned to John Brown, the plot and certificate of survey, &c. (the 2,000 acres before mentioned) which survey was made by virtue of a military warrant, No. 1,734.

M'Ferran v. Taylor and Massie.

4. That on the 31st of July, 1797, he assigned to Massie, &c. the 1,000 acres before mentioned, being a survey of part of the same warrant.

5. That the complainant demanded of Taylor 500 acres, in virtue of the said bonds, before the commencement of this suit; but it does not appear that any lands have been conveyed in compliance with that demand; neither does it appear that any particular piece of land was pointed out by the complainant, when the said demand was made, except that he had made his election to have 500 acres out of the survey assigned to Massie, and gave notice thereof to Taylor, who refused to convey it.

6. That 500 acres might be laid off in that survey worth five dollars an acre, in the form called for in the bonds.

7. That the 5,000 acres mentioned in the bonds, were part of the warrant No. 1,734, for 6,000 acres, granted to Taylor for his own services.

8. That Taylor had the entry of 1,000 acres of June 15th, 1780.

9. That when the bonds were executed, Taylor had a military warrant for 6,000 acres, 1,000 whereof were entered on *Paint Creek*, in partnership with the locators, and since assigned to Massie; 2,000 were exchanged with Abraham Buford, for other 2,000 acres of military warrants, in separate entries of 1,000 each, because Taylor deemed it more probable that he should get good land on small entries than on large ones.

10. That 1,000 acres of the said 5,000 were entered on the south side of *Green River*.

11. That the remainder of the 5,000 acres is located on *Paint Creek*, or its waters.

12. That Taylor is willing that the complainant should make his choice out of any of the three tracts of 1,000 acres each, south of *Green River*, or out of the 1,000 acres on the waters of *Licking*, or out of the 500 acres, or the 1,500 acres, on the waters of *Paint Creek*.

13. That the average price of lands on Hingston is three and a half dollars per acre, and on Slate two dollars per acre.

14. The 1,000 acres adjoining Thompson are worth two dollars per acre.

15. The land transferred from Taylor to Buford is worth one dollar and fifty cents per acre.

16. The land transferred by Buford to Taylor is worth two dollars per acre.

The decree of the district court, upon the bill, answers, and facts found, was, in substance,

That the complainant should, on or before the 1st of September then next, make choice of his 500 acres out of the following tracts of land, to wit: 1,000 acres adjoining Major Thompson's entry, on a buffaloe road leading from *Hingston's fork* to the *Sweet Licks*; the 2,000 acres transferred by Buford to Taylor; the 1,000 acres entered in the name of Taylor on *Lost Creek*, a branch of the Ohio; the 500, or the 1,500 on *Paint Creek*; and give notice to Taylor of such choice within one month after it should be made.

Commissioners were appointed to lay off and survey the said 500 acres for the complainant; and it was further decreed, that Taylor should, before the 1st of November, then next, convey the said 500 acres to the complainant; but if the complainant should not make his choice, and give notice as aforesaid, then Taylor should, on or before the 25th of the then next November, convey to the complainant, 500 acres out of one of the said tracts, in a reasonable form, according to the condition of the bonds; and that Taylor should pay the costs of the suit.

Upon this decree the complainant sued out his writ of error.

Breckenridge, attorney-general, for plaintiff in error. The record shows, that Taylor had no land on *Hingston*,

M'FERRAN v. TAYLOR AND MASSIE.

and that, at the time of the decree, the plaintiff had not the liberty to choose out of the 5,000 acres.

When a specific execution of a contract is decreed, it must be decreed to be executed entirely, or not at all.

Contracts receive the same construction in a court of equity as in a court of law. Neither can make an agreement for the parties.

A court of law, in the construction of the present bond, on an action of debt, upon a breach of the condition in not conveying land on *Hingston*, could not consider the bond as discharged by the conveyance of land on *Slate Creek*.

The defendant knew, or ought to have known, his property, so as not to deceive the plaintiff.

The difference in value between the lands on those two water courses, is found by the jury to be a dollar and a half per acre. Suppose the land on *Slate Creek* had been worth ten times as much as that on *Hingston*, the defendant could not, by this bond, have been compelled to convey land on *Slate Creek*, when he had contracted to convey land on *Hingston*.

As the defendant, therefore, had no lands on Hingston, a specific performance of the contract was impracticable, and, therefore, the plaintiff was, at least, entitled to damages to the value of those lands.

The decree is erroneous in another point. It directs the plaintiff to make choice out of 5,000 acres of the defendant's land, *when it is confessed by the answer* that the defendant had but 4,500 acres; the 500 on the waters of *Paint Creek* having been sold by him. It is true, that the 12th fact found is, that the defendant is willing to let the plaintiff have his choice out of all his military lands, including these 500 acres, but a jury can find nothing contrary to that which is *confessed* or *not denied* in the pleadings.

The court below has decreed that the defendant may *specifically* execute his contract, although it appears,

1. That he has no land on *Hingston*.

2. That he has sold 500 acres of the 5,000, and, consequently,

3. That the 6,000 acres out of which the plaintiff had a right to choose, is reduced to 4,500.

By the contract, the plaintiff had a right to choose out of 6,000 acres, and as the defendant had no land on Hingston, is it not fair and equitable that the plaintiff should have liberty to choose out of the defendant's 6,000 acres? And as the defendant has reduced the plaintiff's choice to 4,500 acres of land, inferior to the other 1,500 acres, the plaintiff seems to be entitled to damages for the difference in quality.

The plaintiff is certainly entitled either to a choice out of the whole of the defendant's military lands, or damages equal to the whole value of the lands on Hingston.

Hughes, for defendant in error. Two questions arise in this case:

1. Had the plaintiff a right to choose lands not mentioned in the bond?

2. Has any conduct of the defendant enlarged the plaintiff's right of choice, under the contract?

The bill charges no fraud.

Massie's 1,000 acres were not within the plaintiff's choice. Taylor meant to reserve these 1,000 acres unincumbered. The plaintiff was to choose only out of 5,000 acres; and, although Taylor had a right to locate 6,000 acres, yet that was no reason for the plaintiff's claim to choose out of the whole 6,000. The answer of Taylor positively denies that the plaintiff's choice was intended, or understood by either party, to extend to the whole 6,000 acres of military land; and this answer being re-

M'FERRAN v. TAYLOR AND MASSIE.

sponsive to an allegation in the bill, and not contradicted by evidence, is conclusive upon that point.

2. Has any conduct of the defendant enlarged the plaintiff's right of choice?

He relies on the mistake in the description of the land, but does not allege fraud.

If it was a mistake, both parties were equally ignorant, as both lived in Botetourt county, in Virginia.

It was not known to either, that the lands on one of the creeks was more valuable than those on the other, or that they would become so in the course of the twenty years which have now elapsed since the date of the contract.

The words of the bond are, "out of one thousand acre tract located by the said Richard Taylor, on *Hingston's Fork of Licking*." The real location was, "on a buffaloe road leading *from Hingston's fork* to the *sweet licks*." The description was intended to be of the *tract* located by the defendant several years before, and was not intended to fix its locality. Both the parties meant the same thing; they meant the 1,000 acre tract located by the defendant in 1780, wherever it might lie. The fact turned out to be, that the tract did not lie exactly as it was supposed to lie, but still it was the same tract which was contemplated by both parties. The description "*on Hingston's fork of Licking*," could not, at that time, influence the plaintiff; he has not even averred in his bill that it did.

The defendant has always been ready and willing to give the plaintiff his choice in the land actually intended by both parties, at the time of the contract.

The jury have found the *present* comparative value of the lands, not what it was twenty-two years ago. Its present value may depend on a variety of circumstances, which could not have been foreseen and contemplated at the time of the contract.

The defendant is ready specifically to execute the contract as it was understood by the parties at the time: but, as the plaintiff now construes it, it cannot be executed specifically, and, therefore, there is no ground for an equitable jurisdiction. The party must be left to his remedy at law.

There is no contradiction between the admission in the defendant's answer, that he had sold the 500 acres which the plaintiff had refused, and the 12th fact found by the jury, that the defendant was willing that the complainant should make his choice out of those 500; for, although the defendant may have sold them, yet, it does not appear that he has conveyed them away, and he may be willing to forfeit his contract for the sale of them, if the plaintiff should choose them; or if conveyed, he may be willing to take the chance of repurchasing them.

The *Attorney-general*, in reply. Under no rational or legal construction of the bonds can they be supposed to refer to lands located on *Slate Creek*, when they mention lands located on *Hingston*. This would be to make, and not to construe the contract. The acquirement of *land on Hingston* was the plaintiff's object. It was unimportant to him *by whom*, or *when* the lands were located.

If the defendant had contracted to transfer, on a certain day, 6 *per cent stock*, he could not discharge that contract by the transfer of 3 per cent stock, although he should make up in quantity, the difference of value arising from the different quality of the stock. But here the defendant offers only the same quantity of *inferior* land.

It is no excuse for the defendant to say, that no fraud was intended by him in describing the land as lying on *Hingston*, when it laid on *Slate*; and that it was a mere *mistake* of a name. Whether it happened by mistake, or fraud, is totally immaterial to the plaintiff. The defendant sold, and the plaintiff bought the land, on the *defendant's own description*. He was bound to describe it truly. But the jury have found his description to be false in a very important particular. The injury to the plaintiff is the

M'FERRAN v. TAYLOR AND MASSIE.

same, whatever may have been the *motives* of the defendant, and he is equally bound to repair the injury.

The plaintiff, therefore, if not entitled to the land on *Paint Creek*, which he has elected, or to the value thereof, is entitled to the value of the lands on *Hingston*.

MARSHALL, Ch. J. delivered the opinion of the court.

The bill states the original contracts, and claims a specific performance, by permitting the plaintiff to elect the 500 acres to which he is entitled, out of the tract of 1,000 acres, which had been located on *Paint Creek;* and also contains a prayer for general relief.

On the specific object of the bill, the right to make an election out of the lands on *Paint Creek*, there can be no difficulty. One thousand acres, part of the original warrant, having been clearly withdrawn at the time of the contract, from the quantity out of which the 500 acres, sold by the defendant, were to be chosen, there can be no pretext for the claim set up in the bill.

As little foundation is there for the claim to damages, instead of the land itself, on account of the 500 acres stated in the answer to have been sold; which sale, the counsel for the complainant considers as a wrong which has put out of his client's reach a tract he had a right to elect, and has, consequently, disabled the defendant from complying with his contract.

To this claim, two answers may be given, either of which would completely defeat it.

1st. The fact found by the jury shows, that the defendant is still ready to convey this land. The attorney-general would exclude this finding from the case, because it contradicts the admission of the answer; and it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded.

The principle of law is unquestionably laid down correctly; but the court can perceive no incompatibility between the admission of the answer, and the fact, as found by the jury. They may both be true; and, of conse-

quence, the court must consider both as true. After the answer was filed, the land may have been repurchased by Mr. Taylor, and such a repurchase would have been proper evidence to justify the fact found by the jury, and would put him in a situation to perform his contract, so far as respected this particular tract. But were it even otherwise—

The 2d answer is, that the concession made by the defendant must be taken altogether. He states the complainant to have refused this particular tract of 500 acres before it was sold. The complainant had, consequently, elected not to take it, and, of course, the defendant was at liberty to dispose of it.

The other point in the case is attended with more difficulty. It is, that the representation made by Taylor, at the time of the sale, was untrue in a material point. He represented the tract of 1,000 acres which had been located, and out of which the plaintiff would have a right to take the lands he purchased, to lie on *Hingston's fork of Licking*, when, in truth, it lay on *Slate*, another branch of the same river, where the lands prove to be less valuable than on *Hingston*. That this misrepresentation is material, cannot be denied; but it is contended by the defendant, that it originated in mistake, not in fraud; and as the country was at that time unknown to both the contracting parties, and the material object was to give the purchaser a right to take the land he had purchased out of the tract already located for the seller, an accidental error in the description of the place where the tract in contemplation of the parties lay; an error which could have had, at the time, no influence on the contract, ought not now to affect the person who has innocently committed it.

From the situation of the parties and of the country, and from the form of the entry, it is reasonable to presume, that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain

M'FERRAN v. TAYLOR AND MASSIE.

liable for that variance. In this case, the defendant has sold land on *Hingston*, and offers land on *Slate*. He has sold that which he cannot convey, and as he cannot execute his contract, he must answer in damages.

It is, therefore, the opinion of the court, that the plaintiff is entitled to an issue, to ascertain the damages he has sustained by the inability of the defendant to perform his contract, and to the damages which shall be found.

Although, in the general principles laid down, the court was unanimous, I did not, in consequence of the particular circumstances of this case, concur in the opinion which has been delivered. I will briefly state those circumstances.

In his bill, the plaintiff does not allege, that he was, in any degree, induced to make the contract, by supposing the land already located to lie on *Hingston's fork*. This representation, then, was an accidental circumstance which has not, in the slightest degree, influenced his conduct. Nor does he now, in his bill, urge this variance in the description of the property as a reason for claiming damages, instead of the specific thing contracted to be sold. Nor does it appear, that this claim was set up in the district court. On the contrary, he alleges, that the land on *Paint Creek* is also in his power, and insists on making his election out of that tract. Under such a bill, in a case where the contract is a very advantageous one to the purchaser, I am not convinced that a court of equity ought to award him damages, on account of an error in the description of the property which was innocent in itself, which at the time appeared to be unimportant, and which most obviously did not conduce to, or in any manner affect, the contract. The person claiming damages in such a case should, I think, be left to his remedy at law. I should, therefore, have been disposed to affirm the decree of the district court. I am, however, perfectly content with that which I have been directed to deliver.*

* The judges present were, *Marshall*, Ch. J. *Paterson*, *Washington*, and *Johnson*, Justices.

WILSON v. SPEED.

An assignee of a preemption-warrant is held to be a competent witness, if the facts intended to be proved by his testimony not tend to support the title of the party producing him.

A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits.

ERROR to the district court of Kentucky, on a judgment which dismissed the *caveat* of Wilson against Speed.

The *caveat* was in these words: "Let no grant issue to James Speed, a citizen of the state of Kentucky, for 139 acres of land, said to be surveyed upon an entry of 200 acres, by virtue of a treasury-warrant, number 13,800, the 24th of November, 1782, and the survey dated the 10th day of November, 1797, because John Wilson, a citizen of the state of Virginia, claims the same; part by virtue of a survey made on his settlement-right, the 20th day of January, 1786, and part by virtue of a survey made on the entry of his preemption-warrant, on the 20th day of January, 1786, for Andrew Cowan, and assigned by him to William Dryden, for *his* use; which claims are of a superior nature to the said Speed's. April 22d, 1799."

(Signed) "JOHN WILSON."

The facts appearing upon the record, so far as they are pertinent to the questions before this court, were as follows:

In the year 1776, *Wilson* made an improvement, by raising a crop on the land, and built part of a cabin.

In consequence of this improvement, he obtained, on the 16th of February, 1780, a certificate for a settlement-right to 400 acres, and a right of preemption to 1,000 acres.

On the same day Andrew Cowan obtained a certificate for the preemption of 1,000 acres, on account of marking and improving the same, in the year 1776, adjoining the lands of John Wilson on the north side, to include his improvement.

WILSON v. SPEED.

On the 23d of October, 1780, Andrew Cowan *entered a preemption-warrant* for 1,000 acres, *on the head-waters of Boon's Mill Creek*, to include his cabin, and the head-waters of several small branches running into Kentucky and Dick's river. "*Also, as assignee of John Wilson's one thousand acres, adjoining the above, including said Wilson's cabin.*"

On the 29th of April, 1783, John Wilson entered "400 *acres* of land, by virtue of a certificate for *settlement*, lying on a dividing ridge between the waters of Kentucky, and Dick's rivers, to include part of both waters, and his improvement."

These 400 acres were surveyed for Wilson on the 20th of January, 1786; and were never assigned by him.

On the same day, the 1,000 acres, upon the preemption warrant, were surveyed for *Andrew Cowan, as assignee of Wilson.*

On the back of this original certificate of survey, was written an assignment, purporting to be from *Andrew Cowan* to *William Dryden*, and attested by "*Young Ewing.*" And also an assignment, (made by order of Garrard county court, during the pendency of the present caveat) by certain commissioners, in behalf of the heirs of Dryden, to *William Buford.*

On the 24th of November, 1782, James Speed, the defendant, entered 200 acres upon a treasury-warrant, the survey upon which was the cause of the present caveat.

This survey was for 139 acres, part of the 200, dated the 10th of November, 1797, and interfered with Wilson's survey of 400 acres, upon his settlement-right, and with that for 1,000 acres *preemption*, which were surveyed in the name of Andrew Cowan, as assignee of Wilson. Upon the inquiry into the facts before the jury, the plaintiff, Wilson, took two bills of exceptions. The first stated, that he offered to produce the said *Andrew Cowan*, (who had released to the plaintiff and

all claiming under him, all his, the said Cowan's, right to the land, &c.) to prove, that although the preemption-warrant for the 1,000 acres was taken out in his name, it was not taken out *by him*, or *with his privity*; and that, although the entry was in his name, it was not made by him, or with his privity. And also, to prove, that he never did, and does not now, set up any claim or title to the said preemption, or any part thereof. Also, to prove, that the assignment on the original survey of the said preemption, now brought into court by the register of the land-office, purporting to be an assignment made by the said *Cowan* to William Dryden, was not executed by him; the execution of the same not being proved by "*Young Ewing*," the attesting witness to the same.

But the court was of opinion, that the said Cowan was not a competent witness, and excluded him from giving testimony.

The 2d bill of exceptions stated, that, after the testimony of Cowan was excluded, the plaintiff offered to produce Charles Campbell, to prove that the said assignment, and the signature thereunto, as well as the name of the attesting witness, were in the hand-writing of William Dryden; to the admission of which testimony the defendant objected, alleging, that "*Young Ewing*," the subscribing witness, ought to have been produced, and the court being of that opinion, the testimony of Charles Campbell was also excluded; and the caveat was *dismissed*, with costs.

Hughes, for the plaintiff in error, contended, that the judgment of the court below was erroneous, for two reasons.

1st. Because the witnesses who were rejected, were competent. And,

2d. Because the caveat ought not to have been dismissed, as to that part of the defendant's survey which interfered with Wilson's survey of 400 acres, upon his settlement-right.

WILSON v. SPEED.

1. As to the rejection of the witnesses.

If Cowan had any interest, it was removed by the release. And if it be alleged, that he ought not to be permitted, upon the ground of impolicy, to discredit his own paper, the answer is, that that principle has been applied only to *negotiable* paper; but here the witness is called merely to disprove what is alleged to be his hand-writing. It is to show, that he never put his hand to the paper, and not to invalidate a paper to which he had given a credit, by subscribing his name. The counsel for the defendant below relied upon the case of *Walton* v. *Shelly*, 1. *T. R.* 296; but, besides the inapplicability of the case, it has been overruled by that of *Fordaine* v. *Lashbrooke*, 7 *T. R.* 601.

But Campbell's testimony ought not to have been rejected. The court rejected it on the ground, that "*Young Ewing*," the subscribing witness, ought to have been produced. It is true, that if we had wanted to establish the assignment from Cowan as genuine, it would have been incumbent upon us to have produced *Young Ewing*, or accounted for his absence. But, if the assignment was fictitious, how was Young Ewing to prove that Cowan did not execute it? He could only say, that his own name was not written by himself, and that he did not subscribe his name as a witness to that instrument; but it does not necessarily follow, that Cowan did not execute the assignment. The testimony of Young Ewing was not the best evidence of the fact that the plaintiff wished to prove. Whereas, Campbell could have proved expressly, that the whole assignment and signatures were written by *Dryden*, and not by Cowan and Ewing.

2. But the judgment is erroneous, because it *dismissed* the caveat, and did not decide which of the parties "hath the better right." It does not appear to have been decided upon its merits; particularly, as far as the plaintiff claimed a *settlement-right*.

Breckenridge, Attorney-General, for defendant. The testimony of Cowan was properly rejected on three grounds.

1. Because it went to prove a title different from that set up by the plaintiff.

The act of assembly requires, that the caveat should express "the nature of the right, on which the plaintiff therein claims the land."

The caveat states, that he claims "by virtue of a survey, made on the entry of his preemption-warrant," "for Andrew Cowan, and *assigned by him* to William Dryden, for *his*" (the plaintiff's) "use."

The proof offered was, that the survey and warrant never were assigned by Cowan. The plaintiff, therefore, wished to bring proof to contradict his own allegations.

The jury are, by the land-law, to find "such facts as are *material* to the cause, and not agreed by the parties." But the facts offered to be proved, were *foreign* to the cause.

2. Because the testimony went to contradict and falsify a record.

According to the uniform decisions of the courts in Kentucky, warrants, entries and surveys, are matters of record, as much as the patent. The records produced by the plaintiff, show, that the warrant, entry and survey, are in the name of Cowan, and that Cowan *assigned* to Dryden, and that Dryden's heirs, by a decree of Garrard county court, assigned to Buford.

The facts would have been contradicted by the testimony offered.

But if the plaintiff could be permitted to invalidate or falsify the record, it could not be done on the trial of a caveat, which is intended as the means of trying *legal* rights to *incipient* titles—titles which are on their passage to maturity. *Ante, vol.* 1, *p.* 66. It is a proceeding in derogation of the common law, and ought to be strictly pursued. If Cowan has no title, or is only a trustee, this inquiry cannot be made in the trial

WILSON v. SPEED.

of a caveat, but must be made in equity. Dryden's heirs cannot be bound by such an *ex parte* inquiry; and they are interested as assignees of Cowan. In order to overturn the claim of Speed, Wilson must have had a prior existing *legal* right.

3. Because the witness might be ultimately benefited by the event of the suit.

The release is of no avail; it came from the wrong quarter. Cowan ought to have been released by Dryden's heirs and Buford.

Cowan is interested in one of two ways, or in both. 1st. In the ultimate goodness of the title by his assignment, or, 2d. For having assigned that to which he had no claim. If Wilson prevails, Cowan is benefited, because the title which he transferred is sanctioned and settled by the decision. If the determination of a cause may, perhaps, prevent a suit against the witness, he is inadmissible. *Esp. N. P.* 705.

As to the correctness of excluding Campbell's testimony, there can be no doubt. To have received it, would have violated that known rule, that the subscribing witness to an instrument must be produced. This rule, it is true, has some exceptions, but none that will include this case. *Esp. N. P.* 780.

But if all the testimony offered had been admitted, it would have been irrelevant; and would have been bad upon demurrer. At the time of entering the caveat, the plaintiff had no right in law, because it was registered in the name of Dryden. At the time of the decree, it was in Buford, under the decision of the court of Garrard county.

With respect to the 2d point made by the plaintiff's counsel, viz. that the caveat was not dismissed upon the merits, so far as relates to the plaintiff's *settlement-right*, he is probably mistaken in point of fact.

The judgment of the court, although not altogether full and formal on this point, justifies the inference that the court did examine into the merits of that claim. Of this, however, the court here will judge for themselves, upon an inspection of the judgment itself, as stated on the record. It says "the court being now sufficiently advised of, and concerning *the premises*, is of opinion, that the caveat herein be dismissed;" and this is the only judgment which could have been given against the plaintiff. If the judgment had been for the defendant, it would have said, that he had the better right.

Hughes, in reply. It has always been the practice of the courts in Kentucky, to decide the right to be in the plaintiff or defendant, when the decision is on the merits.

The testimony offered, did not go to prove a different title from that set up by the plaintiff; it went to prove his allegation to be substantially true.

The process by caveat is a summary remedy, and the law, by directing the court to decide according to the *very right of the case*, gives a chancery jurisdiction. In case of a caveat, there can be no legal title. It is a process given expressly to prevent a legal title.

The entry, &c. are not matter of record. It is true, there appears to be an assignment on a paper in the register's office, but that does not make the assignment a record.

Cowan was not interested. He was not liable to Dryden if the assignment was a forgery.

Campbell's testimony was the best evidence, to prove the fact for which it was offered. That of the subscribing witness might be the best evidence that the assignment was genuine, but not that it was a forgery.

WILSON v. SPEED.

The judgment was not upon the merits, and there is nothing in the record, from which a contrary inference can be drawn.

February 14.

MARSHALL, Ch. J. delivered the opinion of the court.

In this case, the errors assigned are,

1. That testimony has been improperly rejected by the judge of the district court.

2. That the caveat, as to that part of the land which was claimed in virtue of the survey on Wilson's settlement-right, was improperly dismissed.

The caveat, so far as respects the claim of Wilson, in virtue of the survey on his preemption-warrant, thus stated his title: "John Wilson claims, by virtue of the survey, made on the entry of his preemption-warrant, for Andrew Cowan, and assigned by him to William Dryden, for his use."

The preemption-warrant issued on Wilson's certificate to Andrew Cowan, as assignee thereof; the survey was made in Cowan's name, and is assigned to William Dryden, but the assignment does not purport to be for the use of John Wilson.

At the trial, the plaintiff offered to prove, that the assignment to Cowan was made in trust for himself, and that the assignment to Dryden was never made by Cowan. The witness, by whom these facts were to be substantiated, was Cowan himself. He was objected to by the counsel for the defendant, as incompetent, and the objection was sustained by the court. To this opinion of the district judge, an exception was taken, and the question proposed, is the competency of Cowan to prove the fact, that he never was entitled to the land in controversy, and did not make the assignment of the survey.

We put the release out of the case, because it cannot affect the interest of Cowan, if he had any, that interest being a liability to the person appearing to be his assignee.

Upon a consideration of this fact, and its connection with a caveat brought by Wilson, the witness appears to the court, to stand free from any possible objection on the part of the defendant. It would not appear, that he could derive a benefit from proving in this cause, that he never was entitled to the land in dispute, and never assigned the survey.

But, from the facts proposed by the plaintiff, which were before the court, it appears that Dryden had sold to Buford, for whose benefit this caveat was really brought; and it is alleged by the counsel for the defendant, that if the testimony of the witness would establish the right of those who might ultimately resort to him, under his supposed assignment, and such a suit would be prevented by a decision of this caveat, in favour of Wilson, he is, therefore, an incompetent witness; but the court does not perceive, that this consequence would flow from the testimony; and if it is imagined, that Cowan might suspect it, this would constitute an objection, rather to his credit than his competency. Cowan, therefore, was competent to prove the facts, to establish which, his testimony was offered. But if he had been received, and had established those facts, what would have been their amount? They are,

"That Cowan never did purchase the said preemption, did not make the entry on the preemption-warrant, or survey it, or procure it to be surveyed, and does not now, nor ever did, claim title to the same.

"That the plaintiff, claiming to own the land, did sell it to William Dryden, who sold the same to William Buford, for whose benefit the caveat was brought."

These are the facts, which the plaintiff proposed to prove, and which are stated on the record. Had they

WILSON v. SPEED.

been proved, it appears to the court, that the caveat ought to have been dismissed. These facts do not support the title set up in the caveat.

It is conceived by this court, that the statements made in the caveat could only be supported by an assignment, which, on the face of it, purported to be for the use of Wilson. That an assignment made to Dryden, whereby the legal ownership of the survey was conveyed to him, although, in fact, intended for the benefit of Wilson, would not enable Wilson to maintain a caveat in his own name. It would authorise him to use the name of Cowan, but not to prosecute the suit in his own name. If, however, a contrary practice has been firmly established in Kentucky, the court would be very unwilling to shake that practice. But in this case, the assignment to Dryden was not, in fact, for the use of Wilson, but of Dryden himself. The testimony, therefore, if received, could only have defeated the plaintiff's action. It cannot be said, therefore, that the judge has erred in dismissing the caveat, as to the part claimed under the preemption-warrant.

But, with respect to so much of the caveat as was supported by the survey on the settlement-right, no exception of form, or to the testimony, has been taken, and it ought not, therefore, to have been dismissed, but on the merits. On this point, therefore, there is error in the judgment of the district court, for which it must be reversed.

This cause came on to be heard, on the transcript of the record of the proceedings of the court, for the district of Kentucky, and was argued by counsel, on consideration whereof, it seems to the court, that there is error in the judgment of the district court in this, that the caveat entered by the plaintiff was entirely dismissed, whereas, it ought to have been decided on its merits, so far as respected that part of the land which was claimed by the plaintiff under his survey of four hundred acres. It is, therefore, considered by the court, that the said judgment be reversed and an-

nulled; and that the defendant pay to the plaintiff, his costs. And the cause is remanded for further proceedings.

WILSON v. SPEED.

BUDDICUM v. KIRK.

BUDDICUM v. KIRK.

ERROR to the circuit court of the district of Columbia, in an action of debt against the defendant, as heir at law of the obligor, of a bond dated the 20th of September, 1774, conditioned to pay 994*l.* 3*s.* 5*d.* Virginia currency, in equal instalments, at six and twelve months from the date of the bond.

The defendant being an infant, pleaded by Archibald M'Lain, his guardian.

1. Payment; to which there was a general replication and issue.

2. That after the execution of the bond, viz. on the day of 1784, at, &c. it was accorded and agreed, between the plaintiff and the said James Kirk, (the obligor) in his life-time, that the said James Kirk should assign, and make over to the plaintiff, all the balances of money due to the said James Kirk, and one Josiah Moffett, arising from a store kept by them in partnership, in the town of Leesburgh, in discharge and satisfaction of the said bond; and that the said James Kirk did afterwards, on the day and year last mentioned, at the town aforesaid, pursuant to the said accord and agreement, assign, and make over to the plaintiff, all the aforesaid balances, and the plaintiff did then and there receive the said *assignment and transfer* of the said balances, in satisfaction for the said bond, and this he is ready to verify, &c.

This plea was adjudged bad on general demurrer.

Notice of the time and place of taking a deposition, given to the *attorney at law* of the opposite party, is not such notice as is required by the act of assembly of Virginia. But the attorney at law may agree to receive, or to waive notice, and shall not afterwards be permitted to allege the want of it.

If notice be given, that a deposition will be taken on the 8th of August, and that if not taken in one day, the commissioners will adjourn from *day to day* until it shall be finished; and the commissioners meet on the 8th,

BUDDICUM v. KIRK.

3. "That after the execution of the said writing obligatory, the plaintiff, by his certain deed of release, with his seal sealed, *which said deed is lost and destroyed by time and accident*, did release and discharge the said James, in his life-time, and his heirs, of and from the payment of the said writing obligatory, that is to say, on the day of in the year 1784, at the county aforesaid, and this he is ready to verify."

To which plea, there was a general replication and issue.

Upon the trial, the jury found both the issues of fact for the defendant, and the plaintiff took two bills of exceptions.

1. The first stated, that the defendant offered in evidence, the deposition of Patrick Cavan, tending to prove, that *wheat*, to the amount of 166*l.* 8*s.* 10*d.* had been delivered by the obligor to the plaintiff, on account of the bond, and sundry debts due to Kirk and Moffett, had been assigned to the plaintiff in full discharge of the bond; and that the plaintiff had indulged some of the debtors until the debts were barred by the statute of limitations. That notice was given to the plaintiff's attorney, that the deposition would be taken on the 8th of August, 1801, and if not taken in one day, that the commissioners would adjourn from *day to day* until it should be finished, and that he agreed that it might be taken on that day, whether he attended or not; but did not assent or object, to its being taken on any other day. That the commissioners, to whom the dedimus was directed, met on the 8th of August, 1801, and adjourned to Monday the 10th, and from the 10th to the 11th, from the 11th to the 12th, and from the 12th to the 19th, when the deposition was taken. That the plaintiff's attorney did not attend on the 8th, or any of the other days, and had no notice of the several adjournments.

That the defendant also offered to prove by Archibald M'Lain, that the plaintiff's attorney, after the deposition was taken, read it, but did not then object

and adjourn from day to day till the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeably to notice.

Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that *wheat* was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant *assigned* sundry debts to the plaintiff, part of which were collected by the plaintiff, and *part lost by his indulgence or negligence.*

An assignment of debts, and balances of accounts cannot be pleaded as an accord and satisfaction to an action of debt on a bond.

to its being read in evidence; and that the said Patrick Cavan died before the trial. To the reading of this deposition, the plaintiff objected, but the court suffered it to be read.

2. The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that the defendant was not entitled, on the plea of payment, to discount the bonds and notes assigned to the plaintiff, as mentioned in the deposition of Cavan, unless it should appear to the jury that the same had been collected by the plaintiff; which instruction the court refused to give, but directed the jury, that the deposition was competent evidence to be offered in proof of a discount on the plea of payment.

E. J. Lee, for the plaintiff in error, contended,

1. That the deposition was irregularly taken, inasmuch as a notice to take a deposition on the 8th, is not notice to take it on the 19th; and although notice was given, that if the deposition was not taken on the 8th, the commissioners would adjourn from *day to day*, yet in this case, they adjourned over from the 12th to the 19th, without giving new notice. Besides, the notice in this case is to the attorney *at law*, and not to an attorney *in fact*. If it be said, that an attorney at law may bind his client, by an agreement relative to any matter in the proceedings, or trial of a cause, yet, the assent of the attorney only went to the taking the deposition on the 8th of August, and not on any subsequent day.

2. It was not competent for the defendant to prove that assent, by the testimony of Archibald M'Lain, who was his guardian of record, and answerable for costs.

3. The matter contained in the deposition, was not competent evidence upon either of the issues. It certainly was not evidence of a release under seal; and the assignment would not be a payment, unless it produced the money to the plaintiff. If any thing but money is relied upon as satisfaction of a bond, it must be pleaded by way of accord and satisfaction, and not

BUDDICUM v. KIRK.

cord, that he was the guardian; and especially, as the defendant became of full age, before the trial.

3. The objection to the applicability of the deposition, is also void of foundation. For, although it was not conclusive evidence, it was still admissible.

The court is, therefore, of opinion, that there is no error in the judgment below.

Judgment affirmed.

DOUGLASS AND MANDEVILLE v. M'ALLISTER.

DOUGLASS & MANDEVILLE *v.* M'ALLISTER.

ERROR to the circuit court of the district of Columbia, in an action of assumpsit, for not delivering flour according to contract.

The court, upon a jury-trial, is bound to give an opinion, if required, upon any point relevant to the issue.

In estimating damages for the breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose. *Semb.*

The transcript of the record contained a bill of exceptions, which stated, that the plaintiff offered in evidence the following writing, addressed by the plaintiff below, to the defendants, the present plaintiffs in error, viz.

"Will you receive my flour on the following terms, viz. Whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the waggoner, and deduct it from the carriage. You will credit me with the highest market price at the time of delivery, and note it on the receipt; and any balance of flour that may remain in your hands unpaid as it is delivered, you will pay me when I send for it, or deliver as much flour as is coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed or charged at sixpence per barrel.

"*Agreed.* Given under our hands, Alexandria, April 27th, 1803.

(Signed) DOUGLASS & MANDEVILLE,
JOHN M'ALLISTER."

The defendants had received from the plaintiff 408 barrels of flour under that contract, and the plaintiff made his election, and demanded the flour of the defendants on the 14th October, 1803. No final answer was made by the defendants to the demand, till the 19th of November; but the intermediate time was given to them to consider of the demand, and make propositions of compromise. No compromise being made, and the flour not being delivered, this action was commenced on the 21st of the same month. It did not appear that any answer was given to the plaintiff's demand. At the trial, the plaintiff offered evidence to the jury of the price of flour on the 19th and 21st days of November, the price being the same on both days, and contended to the jury only for that price. Whereupon, the counsel for the defendants prayed the court to instruct the jury, that in estimating the compensation for the non-delivery of the said flour, they should be governed by the price of that article on the day the plaintiff signified his option, and made his demand under the contract, to have the flour specifically delivered to him; and further prayed the court, in case the aforesaid instruction was not given, to direct the jury by what rule, in point of time, they are to take the price of flour, in the estimation of the damages sustained by the plaintiff, by reason of the breach of the contract. But the court being divided in opinion upon those points, (two judges only being present) did not give the instructions as prayed, wherefore the defendants excepted, &c.

The jury found a verdict for the plaintiff, for 2,159 dollars and 48 cents, upon which judgment was rendered accordingly, and the defendants brought their writ of error.

The question before this court was, whether the court below ought to have given the instructions prayed for by the plaintiffs in error.

This question was submitted, without argument, by *Swann*, for the plaintiffs in error, and *E. J. Lee*, for the defendant.

DOUGLASS AND MANDEVILLE v. M'ALLISTER.

February 17.

MARSHALL, Ch. J. The error complained of is, that the circuit court did not give an opinion on a point proposed. The court was certainly bound to give an opinion, if required, upon any point relevant to the issue.

It appears, from the facts stated, that the cause of action did not accrue until the 19th of November, when the negotiation for a compromise was broken off. A tender of the flour at any time, after the 14th, and before the 19th, would have been a compliance with the contract.

As the plaintiff claimed no more than the price of the flour on the 19th, and as the refusal of the court to instruct the jury, did not alter the verdict, which was for the price on that day, and was for the same amount as if the opinion had been given, there is no error of which the defendants could complain.

Judgment affirmed, with costs.

SIMMS AND WISE v. SLACUM.

SIMMS AND WISE v. SLACUM.

A discharge from the prison-rules under the insolvent act of Virginia, although obtained *by fraud*, is a discharge in *due course of law*; and upon such discharge no action can be sustained upon the *prison-bounds-bond*.

ERROR to the circuit court of the district of Columbia, in an action of debt brought by *Slacum*, as assignee of *Charles Turner*, sergeant of the court of Hustings of Alexandria, upon a *prison-bounds-bond*, in which Simms was the principal and Wise the surety.

The condition of the bond was as follows: "Whereas Jesse Simms, in jail and custody, by virtue of a writ of *capias ad satisfaciendum*, sued out of the clerk's office of the court of Hustings, holden in Alexandria, dated the 12th day of August, 1800, at the suit of George Slacum, assignee of Charles Turner, sergeant of the court of Hustings aforesaid, for the sum of 1,285 dollars and 45

cents, including all legal costs at the time of the caption aforesaid, having prayed the benefit of the prison-rules, as laid out and bounded by order of the court of Hustings aforesaid, and having tendered the above bound Peter Wise, junior, as surety for the same, agreeable to an act of the general assembly in that case made and provided.

"Now, if the said Jesse Simms do well and truly keep himself within the prison-rules, as laid out and bounded by the court of Hustings aforesaid, and from thence not depart, *until he shall be discharged by due course of law*, or pay the aforesaid sum of 1,285 dollars and 45 cents to the aforesaid *George Slacum*, assignee of Charles Turner, sergeant aforesaid, then the above obligation to be void, or else to remain in full force," &c.

The pleadings were finally brought to this issue, *whether Simms did depart from the prison rules without being discharged by due course of law?*

At the trial, three bills of exceptions were taken by the defendants; but the only question decided by this court arose upon the third; which stated, that after the execution of the bond, Simms was discharged by a warrant from two justices of the peace, under the authority of the insolvent act of Virginia; and that being so discharged, and not before, he departed out of the rules. The plaintiff offered evidence to prove sundry acts of fraud committed by *Simms*, in order to procure the discharge; whereupon the counsel for the defendants prayed the opinion of the court, and their instruction to the jury, that if they should be of opinion, from the evidence, that frauds were committed individually by Simms, in obtaining his discharge, but without the participation of the magistrates who granted it, and without the participation of *Wise*, the other defendant, such frauds, so committed by Simms, could not so far vitiate or avoid the said proceedings under the insolvent act, and the discharge so obtained by Simms, as to charge *Wise*, in this action, for a breach of the condition of the bond, by reason of Simms having left the prison-rules by virtue of such discharge. Which instruction, the court refused to give; but were of opinion, and directed the jury, that if they should be of opinion, from the evidence, that any fraud was committed by Simms alone, in obtaining, or for the purpose of

SIMMS AND WISE v. SLAGUM.

obtaining, the said warrant of discharge, though without the concurrence of either of the magistrates, or of *Wise*, in such fraud, it *did* avoid the discharge so obtained by Simms, so as to charge Wise in this action for a breach of the said condition, by reason of Simms' having left the prison rules by virtue of such a void discharge. To which refusal and instruction the defendants excepted.

The act of Assembly of Virginia, 1792, *c.* 67, *concerning the county courts*, § 15, *P. P.* 86,* authorises the county and corporation courts to lay out, and mark the "*bounds and rules*" of their respective prisons; and declares, that "every prisoner not committed for treason or felony, giving good security to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his or her health, and keeping continually within the said bounds, shall be adjudged in law a true prisoner."

The act of 1792, *c.* 79, *concerning the escape of prisoners*, § 2, *P. P.* 119, provides, that if a prisoner, having given security for, and obtained the liberty of the prison-rules, shall escape and go out of the same, the sheriff shall immediately apply to a justice of the peace for an escape-warrant to retake the prisoner, and give notice thereof to the creditor, and assign over to the creditor the bond taken for the liberty of the rules, who shall be obliged to receive the same; and the creditor may proceed to take his debtor upon the escape-warrant; and if he be retaken and committed to jail, the sureties in the prison-rules-bond, shall be discharged; but if the debtor be not retaken on the warrant, and committed, the sureties are liable to the creditor. And the sheriff is not liable, unless the sureties were insufficient when taken.

By the 1st section of the act, the escape-warrant must be upon the oath of the sheriff, or some other credible person.

The act of 1793, *c.* 151, *for the relief of insolvent debtors*, *P. P.* 303, authorises two justices of the peace to discharge insolvent debtors, and provides, that notice

* *P. P.* is used in this book as a reference to *Pleasant & Pace'* edition of the Laws of Virginia, published in 1803. *Octavo.*

shall be given to the party at whose suit the prisoner is in execution. It declares also, that the warrant of discharge shall be sufficient to indemnify the sheriff against any action of escape. And that the prisoner shall not be again imprisoned upon any judgment obtained previous to his taking the oath, unless by virtue of a *ca. sa.* issued by order of the court in which the judgment shall have been rendered.

The estate of the insolvent is vested in the sheriff. But the creditor may, on *scire facias*, have a new *fi. fa.* to seize any property which the debtor may afterwards acquire.

C. Lee, for plaintiffs in error. A prisoner in the bounds is as much in jail as if within the *walls* of the prison. The *oath* of the insolvent debtor was provided as the guard against fraud; but the *bond* is only a substitute for walls to the prison-bounds. As to the *surety*, a discharge by a competent authority is conclusive.

The warrant of discharge is an indemnity to the sheriff, whether obtained by fraud or not. The act of assembly does not expressly provide, that it shall indemnify the surety as well as the sheriff, but he is within the same reason.

The body of the debtor cannot be retaken, unless by order of the court, on proof of fraud. In the case of fraud in the debtor alone, the remedy of the creditor is not by an escape-warrant, but by a new *ca. sa.* against his person, or a *fi. fa.* against his goods.

The sheriff is bound to discharge the prisoner upon receipt of the warrant; if he disobeys it he is liable to an action of false imprisonment; and after obeying it, he cannot go before a justice of the peace, and swear it was an escape, so as to obtain an escape-warrant. If he cannot get an escape-warrant, he cannot assign the prison-rules-bond; for he is, by the act, only authorised to assign it when an escape has actually happened. The creditor is not bound to take an assignment; nor can he demand it. When, therefore, the debtor is discharged by a competent authority, the obligation of the bond ceases. It is *functus officio*; the surety is no longer liable for an escape, and is

SIMMS AND WISE v. SLACUM.

as much discharged as if, after an escape, the debtor is retaken on an escape-warrant, and committed to jail.

The act of assembly did not intend that the bond should give the creditor a new security for his debt, or to place him in a better situation than he would be if his debtor were to remain within the stone walls of the jail. The bond was intended for the ease and benefit of the debtor.

If the bond is a security against the fraud of the debtor, there are no bounds to the responsibility of the surety.

The words "in due course of law," mean by *authority* of law; that is, by a competent legal authority.

The notice required by the act to be given to the creditor, is to enable him to attend and show fraud if he can. But if the surety is answerable for fraud, it would be more for the interest of the creditor not to show the fraud at that time, but to wait until it has had the effect of obtaining a discharge.

If a judgment at law is obtained by fraud, it is still a valid judgment until reversed.

Swann, for defendant in error. In England it is settled, that a discharge under an insolvent act must be free from fraud or collusion, and in every respect regular. It is true that the warrant of discharge is *prima facie* evidence of a due discharge, and throws the burden of proof of fraud upon the other party. *Esp. N. P.* 167, 245. But fraud, when proved, will "*avoid every kind of act.*" 1 *Burr.* 395. *Bright* v. *Eynou.*

In order to guard a creditor against the risk of his debtor's escape, when allowed the liberty of the prison-rules, the law requires that the debtor should bind *himself* in a *penalty*, and if he escapes, he is as much liable at law for the penalty as his surety is, and the surety is as much bound as the debtor. The one is bound exactly as the other is bound. If the penalty is forfeited as to one, it is forfeited as to the other. Whatever would make Simms liable upon the bond, would make Wise equally

liable. If, then, Simms had voluntarily escaped, he would have been liable to the penalty of his bond. But a discharge obtained by fraud and imposition is, *as to him* at least, void; otherwise you permit a man to take advantage of his own fraud; for if the discharge is valid, it puts an end to his obligation upon his bond. A discharge obtained by fraud is, in substance, as much an escape, as if the prisoner had merely gone off in disguise, or imposed upon his jailor by a borrowed dress. But it is a maxim of law, that *no man* shall gain an advantage by his own fraud. If this fraudulent discharge dissolves the obligation of the bond, Simms gains an advantage by his own fraud; therefore, the fraudulent discharge cannot dissolve the obligation of the bond. If the obligation of the bond be not dissolved as to *Simms*, it is not as to *Wise*, for both are equally bound.

But the words of the condition of the bond are, that Simms shall not depart therefrom "*until he shall be discharged* BY DUE COURSE OF LAW." A discharge obtained by fraud and imposition is not a discharge *in due course of law*; on the contrary, it is a *perversion* of the course of law; the law is turned aside from its due course. Shall *Simms* be permitted to say, that his discharge, grounded on falsehood, fraud and imposition, is a discharge in *due* course of law? If *Simms* cannot say it, *Wise* cannot say it. *Wise* can avail himself of no defence at law which would not equally avail *Simms*.

There is a vast difference between the case of the sheriff and that of the surety. The sheriff is bound to obey the warrant. All he has to inquire is, whether the justices had jurisdiction. He is only the officer of the law, and bound to execute all lawful precepts. Not so the surety. He is a volunteer. He undertakes for the *good faith* of the debtor. He substitutes himself in his place, to the extent of the penalty.

It is not necessary that the sheriff should swear an escape before he can assign the bond. It is true he cannot *oblige* the creditor to take the bond, unless an escape has been sworn to; but there is nothing in the law which forbids the sheriff to assign the bond, or the creditor to receive it, without such an oath.

SIMMS AND WISE v. SLACUM.

February 19.

MARSHALL, Ch. J. delivered the opinion of the majority of the court.

This case depends on the construction of an act of the legislature of Virginia, which allows the prison-rules to a debtor whose body is in execution, on his giving bond, with sufficient security, not to go out of the rules or bounds of the prison; that is, while a prisoner. The condition usually inserted is, not to depart therefrom till he shall be discharged by due course of law, or shall pay the debt. The act further provides, that the prisoner, on delivering a schedule of his property on oath, to a tribunal constituted for the purpose, and pursuing certain steps prescribed in the law, shall be discharged, and all his property shall be vested in the sheriff, for the benefit of the creditors at whose suit he is in execution.

In the case at bar, the forms of the law were observed, and a certificate of discharge obtained, after which the debtor departed from the rules. Conceiving this discharge to have been obtained by fraud, the creditor brought a suit upon the bond, and the court instructed the jury, that if a fraud had been practised by the debtor, although neither the justices who granted the certificate, nor the security, partook thereof, yet it avoided the discharge, and left the security liable in this action. To this opinion the defendants' counsel excepted, and upon that exception the cause is before this court.

The certificate of discharge may be granted either by the court sitting in its ordinary character for the transaction of judicial business, or by two magistrates who are constituted by law an extraordinary court for this particular purpose. Whether granted in the one mode or the other, it is of equal validity. In either case, the judgment of discharge is the judgment of a court, and, as such, is of complete obligation.

The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and therefore, all acts performed under them are valid, so far as respects third persons. A

sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud, as if it had been obtained fairly.

When the person who has committed the fraud attempts to avail himself of the act, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose; but it may well be doubted, whether a penalty would be incurred, even by the person committing the fraud, for an act which the judgment would sanction. Thus, if a debtor taken on mesne process escapes, he may be retaken by the authority of the sheriff, and if not retaken, the sheriff may be liable for an escape; but if he fraudulently obtains a judgment in his favour, in consequence of which he goes at large, it has never been imagined that the sheriff could retake him on suspicion that the judgment was fraudulent, or be liable for an escape on the proof of such fraud.

Thus too, where, as in Virginia, an injunction has been adjudged to discharge the body from confinement, if a debtor in execution, by false allegations, obtains an injunction whereby his body is discharged from prison, or from the rules, it has never been conjectured that the injunction thus awarded was void, and the acts performed under it were to be considered as if the injunction had not existed. In that case, it would not be alleged that there was an escape, and that the security to the bond for keeping the rules was liable for the debt, because the discharge was fraudulently obtained; but the discharge would have all its legal effects, in like manner as if no imposition had been practised on the judge by whom it was granted.

The judgment rendered in his favour may not shield the fraudulent debtor from an original claim, but it is believed that no case can be adduced, where an act, which is the legal consequence of a judgment, has in itself created a new responsibility, even with respect to the party

SIMMS AND WISE v. SLACUM.

himself, much less with respect to third persons, who do not participate in the fraud.

It would seem, then, upon general principles, that a debtor who has departed from the prison-rules under the authority of a judgment of discharge, granted in due form by a competent tribunal, has not committed an escape even to charge himself, much less a third person. Such a discharge might not be permitted to protect him from the original debt, even if the case had not been particularly provided for by statute; but the act of departing from the rules, after being thus discharged, could not charge him with a new responsibility to which he was not before liable, much less will it impose on his security a liability for the debt. Departing from the rules, after being discharged in due course of law, is not a breach of the condition of his bond.

This opinion receives great additional strength from those arguments, drawn from the objects and provisions of the act, which have been forcibly urged from the bar.

The objects of the act unquestionably are, not to increase the security of the creditor, but to relieve the debtor from close imprisonment in the confined jails of the country, and to consult his health, by giving him the benefit of fresh air. But as this indulgence would furnish the means of escaping from the custody of the officer, and thereby deprive the creditor of his person, it was thought necessary to guard against the danger which the indulgence itself created, not to guard against dangers totally unconnected with this indulgence. Security, therefore, ought, in reason, to be required against a departure from the rules without a lawful authority so to do, because the means of such departure were furnished by being allowed the use of the rules; but security against a fraud in obtaining such authority need not be required, because the means of practising that fraud are not facilitated by granting the rules. They may be used by a debtor in close jail, as successfully as by a debtor admitted to the rules.

It is also a material circumstance in the construction of the act, that ample provision is made for the very case.

A new capias may be awarded to take the person of the debtor. This remedy is not allowed in the case of an escape; and it is strong evidence that the legislature did not contemplate a departure from the rules, under a certificate issued by proper authority, as an escape; that the remedy given the creditor is competent to a redress of the injury, replaces him in the situation in which he was before it was committed, and is not founded on the idea that there has been an escape.

The argument founded on the provisions respecting the property of the debtor, also bear strongly on the case. They confirm the opinion, that a departure from the rules, under a certificate of discharge granted by a proper tribunal, ought not to be considered as an escape. So, too, does that provision of the act which requires notice to the creditor and not to the security.

Without reviewing the various additional arguments which have been suggested at the bar, the court is of opinion, that upon general principles, strengthened by a particular consideration of the act itself, a departure from the rules under such an authority as is stated in the proceedings, is not an escape which can charge the security in the bond for keeping the prison-rules, although that authority was obtained by a fraudulent representation on the part of the debtor, neither the magistrates nor the security having participated in that fraud.

There is error, therefore, in the instruction given to the jury, as stated in the third bill of exceptions, for which the judgment is to be reversed, and the cause remanded for further trial.

Judgment reversed.

PATERSON, J. As to the third exception, which embraces the main point in the cause, my opinion differs from the opinion of the majority of the court, and accords with the direction given by the court below. The condition of the bond is, "that Simms do well and truly keep himself within the prison-rules, and thence not to depart until he shall be discharged by due course of law, or pay the sum of 1,285 dollars and 45 cents, to George Slacum,

SIMMS AND WISE V. SLACUM.

assignee," &c. The act that will not exonerate the principal, will not exonerate the surety, from the obligation which they have entered into; for the surety stands on the same floor as the principal, and assumes the like character of responsibility, in regard to the terms specified in the condition of the bond. The benefit of the act of insolvency, if obtained by fraud or perjury on the part of Simms, will be unavailing, and his going beyond the limits of the prison, in consequence or under colour of a discharge, thus procured, will be an invalid and unwarrantable departure. Fraud infects the decision; and the legal principle is, that the fraudulent person shall not be suffered to protect himself by his own fraudulent act. If he should, then a judgment, which is laid in fraud, will, as in the present case, operate to the extinction of a legal, pre-existing obligation or contract. But a discharge, fraudulently obtained, is of no virtue—of no operation; and is, in truth and in law, no discharge; it has neither legal effect, nor even legal existence as to the party himself, and the surety, who stands in his shoes. If the judgment be of no avail as to the principal, it will be of no avail as to the surety; it cannot be ineffectual as to the one, and operative as to the other. The discharge must be legal to be valid, and to exonerate the surety from the special condition of the bond. The judgment itself is a fraud on the law; and I can discern no difference between the debtor's going beyond the prison-bounds voluntarily, or under colour of a judgment so obtained; except, that the latter is a case of deeper die, and less excusable in a legal and moral view than the former.

Although Simms is liable to be imprisoned by virtue of a new process, yet he may have gone out of the jurisdiction of the court; or if not, Slacum will be deprived of the benefit of the bond which Simms and Wise executed.

The sheriff stands on different ground; for he is exonerated from all liability, by an express provision in the statute. Besides, if the justices have jurisdiction of the subject, and should not exceed their jurisdiction, it is not incumbent on the sheriff to examine into the regularity, fairness, and validity of their proceedings and judgment; he looks at the instrument of discharge, which, emanating

from a competent authority, it is his duty to obey. But though the discharge may excuse the sheriff, as an officer of the court, it will not excuse the party, nor his surety. As to them, it is inoperative, and of no legal efficacy.

SIMMS AND WISE v. SLACUM.

HARRIS v. JOHNSTON.

HARRIS v. JOHNSTON.

ERROR to the circuit court of the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, for goods sold and delivered, and money had and received.

The defendant pleaded the general issue, and upon the trial took two bills of exceptions.

The first stated, that this action was commenced on the 10th of July, 1801, and that on the trial the plaintiff offered evidence of the sale and delivery of goods, to the amount of 2,149 dollars and 33 cents.

That the defendant offered in evidence a bill of parcels of the same goods, rendered by and in the handwriting of the plaintiff, Johnston, amounting to 644*l.* 16*s.* Virginia currency, containing a particular account of rum and sugar, beginning with these words: "*Mr. Theophilus Harris, bought of Dunlap & Johnston,*" at the foot of which bill was the following receipt, signed by the plaintiff: "Received, Messrs. Clingman and Magaw's note for the above sum, payable to the order of *John Towers*, or order, indorsed by John Towers and Theophilus Harris, payable the 2d April, 1798, when paid, received in full;" which bill was rendered to the defendant by the plaintiff, at the time of the sale and delivery.

The defendant further offered evidence to prove, that the note in that receipt mentioned, was delivered to the defendant with the blank indorsement of Towers, and by the defendant indorsed in blank to the plaintiff, at the time of the sale and delivery of the goods,

An action cannot be maintained, on an original contract for goods sold and delivered, by a person who has received a note as conditional payment, and has passed away that note.

A bill of parcels delivered by *I*, stating the goods as bought of *D* and *I*, is not conclusive evidence against *I*, that the goods were the *joint* property of *D* and *I*; but the real circumstances may be explained by parol.

If part of the goods were the sole property of *D*, and the residue the sole property of *I*, and if *I* had authority from *D*, to sell *D*'s part, *I* may

HARRIS v. JOHNSTON.

maintain an action for the *whole*, in his own name.

An indorsee of a promissory note, payable to order, cannot, *in Virginia*, maintain an action *at law*, upon the note, against a *remote* indorsor, but he may *in equity*.

and by the plaintiff afterwards indorsed to one John Dunlap, who, on the 19th of April, 1798, brought suit thereon against the present defendant, Harris, in the court of Hustings, in the town of Alexandria, upon his indorsement, *striking out the name of the plaintiff, Johnston*, and *filling up the defendant, Harris's, indorsement with a direct assignment from Harris to Dunlap*. That upon that suit judgment was rendered, by the court of Hustings, for Dunlap against Harris, from which judgment he appealed to the Dumfries district court, where the judgment of the court of Hustings was reversed,* and Dunlap appealed from the judgment of the district court, to the court of appeals, where the judgment of the district court was affirmed.

The defendant, on the trial of the present suit, also offered evidence to prove, that the said John Dunlap, on the 19th of April, 1798, also commenced suit against Towers, upon his indorsement of the same note, which suit is still pending in the court below. That the said John Dunlap is the same Dunlap whose name is mentioned at the head of the bill of parcels aforesaid, and who is still living.

Whereupon, the defendant prayed the court to instruct the jury, that upon proof of these circumstances, the plaintiff could not recover, in this action, for goods sold and delivered; and that, from the bill and receipt given as aforesaid, the transaction must be considered as a joint contract. Which instruction the court refused to give, as prayed, but directed the jury, that the bill of parcels, before mentioned, is evidence (but not conclusive) of a joint contract of sale for the rum and sugar; and that the plaintiff may explain the transaction by parol, or other evidence, to prove that he

* It was understood and admitted by the counsel on both sides, that the judgment was reversed because the court was of opinion, that, in Virginia, the holder of an indorsed promissory note, payable to order, cannot strike out an intermediate blank indorsement, and fill up the blank indorsement of a remote indorsor, with an order to pay the money to himself; and that the holder cannot maintain an action against any of the parties to the note, but his own immediate indorsor, or the maker of the note.

was the sole owner of the sugar, and that the said Dunlap was the sole owner of the rum, and that the contract for the sale of the sugar was made with the plaintiff in his own right, and that the contract for the sale of the rum was made with him as agent for Dunlap. But if the plaintiff should produce no such explanatory evidence, he could not maintain the present action.

And the court further instructed the jury, that if they should be satisfied, that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap; and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant, for the whole amount of the goods so sold and delivered; and *that the other facts stated are not sufficient to bar the plaintiff.*

The 2d bill of exceptions in the present cause, stated, that the plaintiff produced a witness, who proved, that the sale of the goods was made in the store of Dunlap, where the goods were deposited; that he never knew Dunlap to claim any title to the sugar, nor the plaintiff to the rum; and that, previous to the sale, Dunlap claimed the rum as his separate property, and the plaintiff claimed the sugar as his separate property; and that Dunlap requested the plaintiff to sell the rum with the plaintiff's sugar. Whereupon, the plaintiff prayed the court to instruct the jury, that the evidence so offered was not competent to contradict or explain the purport of the bill of parcels and receipt, or to show that the plaintiff sold part of the goods as his separate property, and the residue as agent of Dunlap; and that it did not amount to proof of such several property and agency, as could enable the plaintiff to recover, in this action, for the whole of the goods sold.

Which instruction the court refused to give; but instructed the jury, that the declarations of Dunlap, or of the plaintiff, or the request of either of them, cannot be given in evidence, unless the defendant was present, when such declaration or request was made.

HARRIS v. JOHNSTON.

A verdict being rendered for the plaintiff, the defendant moved the court for a new trial, which was refused, *and the court ordered the clerk to deliver up to the defendant, the note of Clingman & Magaw, indorsed by Towers, which was referred to in the receipt, and which was filed in the suit of Dunlap* v. *the present defendant.**

Upon this case two questions arose.

1st, Whether the bill of parcels was conclusive evidence of a joint contract of sale, and of the joint property of Dunlap and Johnston?

2d, Whether, under the other circumstances of the case, the plaintiff could recover in this action?

C. Lee, and *Jones*, for plaintiff in error.

1. The bill of parcels is *written evidence*, purporting a joint contract, and cannot be contradicted by parol.

The action ought to have been joint. The bill of exceptions does not state any evidence from which the jury could infer, that part of the goods was the sole property of one, and the residue the sole property of the other. The circumstances offered to prove that fact were too slight to justify the inference, and the court ought to have instructed the jury to that effect.

2. The contract which arose on the sale of the goods has been changed to a special contract, to pay on a certain condition: viz. if the plaintiff shall use due diligence to get the money on the note, and shall not succeed. If the plaintiff negotiates the note, he re-

*The record does not state the whole order of the court upon the motion for a new trial. The court, upon further argument and consideration, being doubtful whether the plaintiff could support this action, until he had got back the note from Dunlap, informed the plaintiff's counsel, that they would grant a new trial, unless the plaintiff would get that note, and return it to the defendant, and also obtain a release from Dunlap to Harris, of all right of action for the rum sold.

ceives its value; he is paid for the goods sold; he has received satisfaction, and can never resort to the defendant, until the note is returned to the plaintiff, and he has taken it up, and offered to return it to the defendant. Whatever would prevent the plaintiff from recovering against the defendant on the note, would equally prevent him from recovering on the contract for goods sold and delivered. The present suit was commenced while suits were depending on this very note, by Dunlap against the present defendant, and by Dunlap against Towers. The defendant cannot, at the same time, be answerable upon the note, and upon the original contract of sale.

The order which the court made, that the plaintiff should deliver up to the defendant, the note which had been filed in the case of Dunlap *v.* Harris, did not aid the judgment. The court had no authority to make such an order; the note was the property of Dunlap, and not of the plaintiff. But the note was of no use to the defendant. It was barred by the act of limitations, and that by the conduct of the plaintiff.

In the case of *Kearslake* v. *Morgan*, 5 *T. R.* 513, it is admitted by the counsel on both sides, that if a negotiable note, given for a prior simple contract debt, be indorsed over by the plaintiff, and is outstanding, the plaintiff cannot recover upon the original contract. In the present case, it must be presumed that the plaintiff received value for the note when he passed it to Dunlap, and it does not appear that he has ever been obliged to refund.

Swann, *E. J. Lee*, and *Simms*, contra. It does not appear that the note was not returned. But this court, in the case of *Clarke & Young*, *ante*, *vol.* 1. *p.* 181, had decided, that it is not necessary, in such a case, to return it. So in the case of *Puckford* v. *Maxwell*, 6 *T. R.* 53, the court said, that "in cases of this kind, if the bill, which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and, therefore, he may consider it as a nullity, and act as if no such bill had been given at all." The same point is

HARRIS v. JOHNSTON.

also decided in 1. *Esp. Rep. 5*, and 7 *T. R.* 64, *Owenson* v. *Morse.*

The question of negligence does not arise in this case. The reason of the admission in the case of *Kearslake* v. *Morgan*, that if the note was outstanding, the plaintiff could not recover upon the original cause of action, is, that the defendant would be liable to be *sued* upon it. The words are, "*if he may be sued upon it by a third person.*" But here the record itself shows that Harris could not be sued upon it by a third person, being only liable to the present plaintiff, who was his immediate indorsee, that point having been decided in the court of appeals in Virginia, upon this very note. As, therefore, Harris is liable upon the note to the present plaintiff only, and, as he will not be liable to *him* on the note, in case he recovers in the present action, it is the same thing as if the note had been taken up by the plaintiff, and ready to be delivered to the defendant.

Jones, in reply, admitted, that modern decisions have laid down the law broadly, that if the note or bill is not honoured, it is of no avail; but it is otherwise, if the note or bill be negotiated; it is then a payment until returned.

In the case of *Young & Clarke*, the plaintiff had not negotiated the bill, and the parties answerable to Clarke were insolvent.

The liability of the defendant to a suit by a third person, on the note, is not the only ground of the opinion in *Kearslake* v. *Morgan*. Another ground is, that the defendant may have the benefit of the note against the parties answerable to him.

But, if the present defendant is not liable to be sued on the note in the name of a third person, yet Dunlap may sue him upon it, in the name of Johnston.*

* *Marshall*, Ch. J. Not if Johnston recovers in the present suit.

Jones. But if Dunlap has a right to the note, he may sue in equity, and payment by Harris to Johnston would not be a bar.

Marshall, Ch. J. True. We shall consider that point. I have

February 19.

MARSHALL, Ch. J. delivered the opinion of the court.

This case comes up on two exceptions taken to opinions given in the circuit court.

The plaintiff in the court below had sold to the defendant in that court, certain goods, wares and merchandize, of which he had given him a bill, headed with the words, "Mr. Theophilus Harris, bought of Dunlap & Johnston," &c. At the foot of this bill of parcels, was the following receipt: "Received, Messrs. Clingman and Magaw's note for the above sum, payable to the order of John Towers or order, indorsed by John Towers and Theophilus Harris, payable 2d April, 1798, when paid, received in full."

This note was indorsed in blank by the defendant in error, and a suit was instituted upon it by Dunlap against Harris, in which suit he ultimately failed, it being the law of Virginia, that on a note, an action by the indorsee can only be maintained against the drawer, or his immediate indorsor.

The defendant below objected,

1st. That the bill of parcels was conclusive evidence of joint property in the goods sold and delivered, and, therefore, that the action was not maintainable in the name of Johnston alone.

2d. That no action was maintainable on the original contract, the plaintiff below having indorsed the note mentioned in the receipt, and not having re-acquired any property in it, so as to be able to restore it to Harris.

No *laches* are imputed, or are imputable to the holder of the note.

always been of opinion, that in such cases a suit in chancery can be supported; though I do not recollect any case, in which the point has been decided.

HARRIS v. JOHNSTON.

Both these points were decided against the defendant below, and a judgment was rendered against him, from which he has appealed to this court.

On the first point the court is of opinion, that there is no error. The written memorandum was not the contract, and was only given to show to what object the receipt at its foot applied. It is not, therefore, a bar to a disclosure of the real fact; it is not conclusive evidence of joint ownership in the property sold, and of a joint sale, but will admit of explanation. The court, therefore, did not err in allowing explanatory evidence to go to the jury, nor in allowing the jury to judge of the weight of that evidence.

On the 2d exception, the material point to be decided is, whether an action can be maintained on an original contract for goods sold and delivered, by a person who has received a note as a conditional payment, and has passed away that note.

Upon principle, it would appear that such an action could not be maintained. The indorsement of the note passes the property in it to another, and is evidence that it was sold for a valuable consideration.

If, after such indorsement, the seller of the goods could maintain an action on the original contract, he would receive double satisfaction.

The case cited from *5th Term Reports*, appears to be precisely in point. The distinction taken by the counsel for the appellee, that in this case Harris can never be sued on the note, is not so substantial as it is ingenious. Harris has a right to the note, in order to have his recourse against his indorsee, and Johnston has not a right to obtain satisfaction for the goods from Harris, while he is in possession of the satisfaction received from Dunlap. In the case quoted from *Durnford & East*, the liability of the defendant to an action from the actual holder of the note, is not the sole ground on which a disability to sue on the original contract was placed. That disability was also occa-

sioned by the obvious injustice, of allowing to the same person a double satisfaction, and of withholding from the debtor, who had paid for the note before he could indorse it, and who would be compelled, by the judgment, to pay for the goods, on account of which he had parted with it, the right of resorting to his indorsor. But, if it was indispensable to show, that *Dunlap* has a remedy against Harris, it is supposed, that the holder of a note may incontestibly sue a remote indorsor in chancery, and compel payment of it.

The case of *Young & Clarke*, decided in this court, does not apply, because, in that case, the plaintiff below had not parted with his property in the note.

The court does not think that the order (made after the judgment was rendered) for the rendition of the note to the defendant below, can correct the error committed in misdirecting the jury.

The judgment is to be reversed, for error in directing the jury that the action was maintainable on the original contract, after the note received as conditional payment had been indorsed.

DIXON'S EXECUTORS v. RAMSAY'S EXECUTORS.

An executor cannot maintain a suit in the district of Columbia, upon letters testamentary, granted in a foreign country.

All rights to the testator's personal pro-

ERROR to the circuit court of the district of Columbia, upon a judgment in favour of the defendants, upon a general demurrer to their plea, which (after *oyer* of the plaintiff's letters testamentary) stated, that the defendants' testator, at the time of making the promises, &c. and from thence, always, until his death, resided in the town of Alexandria, in the county of Alexandria, in the district of Columbia, and that the defendants have always resided in the same town, and that the plaintiffs have not obtained probat of the said

DIXON'S EXECUTORS v. RAMSAY'S EXECUTORS.

letters testamentary, at any place within the district o Columbia, or the United States of America.

E. J. Lee, for the plaintiffs in error. The question is, whether the plaintiffs must take out letters testamentary in the district of Columbia, before they can maintain an action as executors.

perty, are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.

There is nothing in the laws of Virginia, which requires that letters testamentary should be there taken out upon a foreign will, provided they have been taken out in the country where the testator lived and died. The 14th section of the act of Virginia, *P. P.* 162, relates only to the title to lands under a will.

If, then, there is nothing required by the laws of Virginia, the right, and the powers of the executors depend upon the rules of the civil law, and the law of that country of which the testator was a subject.

By the law of England, an executor may commence suit before the probat. 1 *Com. Dig.* 2 *Bac. Ab.* 413.

The very naming of an executor is a disposition to him, of all the testator's personal estate, for he comes *in loco testqtoris*, and is entitled to the surplus, after payment of debts and legacies, 2 *Bac. Ab.* 423. He derives all his power, not, like an administrator, from the government of the country, but from the will of his testator.

The debts due to the estate, follow the person of the creditor, not that of the debtor, and the disposition of them is to be governed by the laws of that country of which the testator was a subject. 2 *Bos. and Pul.* 229, 230, *Bruce* v. *Bruce.* 3 *Vez. jun.* 200, *Bempde* v. *Johnstone. Appendix to Cooper's Bankrupt law*, 29, *Babille's opinion. Vattel, b.* 2, *ch.* 3, § 8, 109, 110, 111. 3 *Dallas*, 370, 377. (*note.*) 4 *T. R.* 184, 175, *Hunter* v. *Potts.*

The case of *Fenwick* v. *Sears*, *ante*, *vol.* 1. *p.* 259, was that of an administrator who derives his whole authority from the laws of the place; it therefore cannot decide the present case, which is that of an executor who derives his whole authority from the will of his

testator. That case, too, was decided under the peculiar laws of Maryland, which differ from those of Virginia upon this subject. *By the law of Maryland*, 1798, *ch.* 101, § 4, no alien can be an executor or administrator.

But it is said, that the rights of creditors require that the executor should give security for the faithful administration of the estate. But this would be of no avail, if the executor, after giving security, should choose to return to England. For, according to the decision of the court of appeals of Virginia, in the case of *Baylor's executors*, a creditor cannot maintain an action against the sureties of an executor, until he has proved his debt by an action and judgment against the executor, and proved a *devastavit* also, by a suit. But he can never get a judgment against an executor, who is not found in the state; and, consequently, can never have judgment against the surety. But if an executor be absent, the creditor may, in chancery, attach the assets. A voluntary payment to an executor, without letters testamentary, in Virginia, is good. Why, then, should not the executor be permitted to sue?

If no purpose of justice is to be answered by refusing the right to sue; and, if it is not refused by the positive laws of Virginia, a strong argument may be drawn from the inconvenience of obliging an executor to procure letters testamentary in every state in the union, and, perhaps, for very trifling debts.

Swann, contra. The case of *Fenwick* v. *Sears*, has settled the question, as to a foreign administrator. In what does that differ from the case of a foreign executor? It is said, that the latter derives his authority from the will, which is an universal title. But the authority under the will is inchoate, until completed by the probat, and is limited to very few acts. It is certain, that an executor, before probat, cannot obtain a judgment. The ordinary in England, and the court in Virginia, may refuse an executor, who is under a disability; for example, an alien enemy; an infant under seventeen; an ideot, &c. Until, therefore, he is

DIXON'S EXECUTORS v. RAMSAY'S EXECUTORS.

received, his capacity to act is not decided by the only competent tribunal.

In England, the ordinary cannot require security from an executor, 2 *Bac. Ab.* 376, 377; it can only be done by the court of chancery considering him as a trustee, when there is good ground to apprehend his wasting the estate. In Virginia, the interest of creditors, legatees and distributees, is attended to. Yet their interest might be destroyed, if the executor was permitted to receive money, or give an acquittance before he had given security. It is, therefore, questionable, whether an executor, in Virginia, can do any valid act, until he has qualified himself according to law.

It is also doubtful whether the assets can be attached, 3 *Wilson*, 297; for that would invert the order of administration. If they cannot, a foreign executor might, by his attorney, withdraw all the assets, and leave the creditors without remedy. A judgment-creditor here would have a preference. But if he sues in England upon a judgment of this country, his claim is reduced to a simple contract.

Probat in a *peculiar* jurisdiction, will not support a suit out of that jurisdiction. It would be strange, therefore, if a probat, even in the prerogative court, which is the present case, should extend across the Atlantic into a foreign country. 1 *Ld. Ray.* 562, *Hilliard* v. *Cox.* 2 *Ld. Ray.* 855, 856, *Adams* v. *Savage.*

The laws of Virginia have provided for the probat of all wills, foreign as well as domestic. *P. P.* 162, § 14 and 15.

C. Lee, in reply. By the civil law, the executor succeeds to all the moveables, and personal estate, and credits of his testator. His title is derived from the will, and his powers are as great as those of his testator were. 2 *Bl. Com.* 510.

The will is to be proved where the testator died, and the property is to be distributed according to the laws of *that* country.

The *whole* estate, wherever situated, is to be distributed according to *one* law. If a foreign executor should give bond in Virginia, by which law is he to be governed? Can there be two executors of the same will, governed by different laws, as to their administration? Can strangers interfere and get administration? It is true, the municipal laws may bind property in the country; but if no such laws, then the property is governed by the laws of the country where the testator had his *domicil.* Security ought not to be required here, if not required in England; and if taken in England, it ought not to be required here. (See *Target's* opinion upon the *Dutchess of Kingston's* will, in *collectanea juridica.*)

February 19.

MARSHALL, Ch. J. delivered the opinion of the court.

The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary, granted to him in his own country.

It is contended, that this case differs from that of an administrator, which was formerly decided in this court, because an administrator derives his power over the estate of his intestate, from the grant of the administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be.

This distinction does certainly exist; but the consequences deduced from it, do not seem to follow. If an executor derived from the will of his testator, a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintains the

DIXON'S EXECUTORS v. RAMSAY'S EXECUTORS.

suit by virtue of his letters testamentary, he can only sue in courts to which the power of those letters extends. It is not, and cannot be denied, that he sues by virtue of his letters testamentary; and consequently, in this particular, he comes within the principle which was decided by the court, in the case of an administrator.

All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.

The court can perceive the inconvenience which may often result from this principle, but it is an inconvenience for which no remedy is within the reach of this tribunal.

Judgment affirmed.

SCOTT v. NEGRO LONDON.

SCOTT v. NEGRO LONDON.

If the owner of a slave removing into Virginia, shall take the oath required by the act of assembly, within sixty days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought

ERROR to the circuit court of the district of Columbia, sitting at Alexandria.

Negro London brought an action of assault and battery against Scott, to try his right to freedom. His claim was grounded upon the act of assembly of Virginia, of the 17th December, 1792, *P. P.* 186; the *2d section* of which is in these words: "Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free."

The *3d section* imposes a penalty upon every person importing slaves contrary to the act.

The *4th section* is in these words: "Provided, that nothing in this act contained, shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within sixty days *after such removal*, he or she shall take the following oath, before some justice of the peace of this commonwealth: "I, A. B. do swear, that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves, *nor have I brought with me any slaves* with an intention of selling them, nor have any of the slaves which I have brought with me, been imported from Africa, or any of the West-India islands, since the first day of November, one thousand seven hundred and seventy-eight. So help me God."

"Nor to any person claiming slaves by descent, marriage or devise; nor to any citizens of this commonwealth being now the actual owners of slaves within any of the United States, and removing such hither; nor to travellers or others making a transient stay, and bringing slaves for necessary attendance, and carrying them out again."

The defendant below took a bill of exceptions, which stated, in substance, the following facts:

The defendant's father, *claiming to own the plaintiff as his slave*, brought him from Maryland into Alexandria, in July, 1802, without the knowledge or consent of the defendant, and hired him out in Alexandria until his death, which happened about Christmas in the same year. The plaintiff has continued to reside in Alexandria until the present time, except about three weeks in April, 1803. The defendant's father never took the oath required by the 4th section of the act. The defendant, in March, 1803, got possession of the plaintiff, and in April following, being then a resident of Maryland, but intending to remove to Alexandria, hired him out in Alexandria, claiming him as his slave, under a bill of sale from Thomas Contee, dated the 3d of September, 1800. The defendant came from Maryland in June, 1803, and on the 5th of July next following, took the oath prescribed by the 4th section of the act. Whereupon, the court instructed the jury, that if they should be of opinion, from the evidence, that the *defendant's father* brought the

into Virginia by a person claiming and exercising the right of ownership over him eleven months before the removal of the true owner; and although the person who brought him in never took the oath; and although the slave remained in Virginia more than twelve months; and although the *true owner* never brought him in.

SCOTT v. NEGRO LONDON.

plaintiff from the state of Maryland into the county of Alexandria in the year 1802, *and exercised acts of ownership over the plaintiff, and hired him out as his slave*, and that the plaintiff has been kept in the county of Alexandria one whole year, or so long at different times as amount to a whole year, from the importation to the bringing of the action, and that no other oath was made than that which the defendant has offered in evidence as aforesaid, then the plaintiff is entitled to his freedom, *although the jury should be satisfied that he was the property of the defendant at the time he was so brought into the town of Alexandria.*

E. J. Lee, for the plaintiff in error. At the time the plaintiff in error took the oath, the negro had not been kept a year in the county of Alexandria; the forfeiture had not accrued; the oath was taken within sixty days after the removal of his owner. The importation by the father, without the knowledge or consent of his son, the owner, did not oblige the latter to take the oath within sixty days after such importation. The act is penal, and is, therefore, to be construed strictly. No prosecution against the son, for the penalty under the third section of the act, could have been maintained, upon such an importation by the father. The oath by the son would have been a good defence. The act does not say it shall be taken within sixty days after the importation of the slave, but within sixty days after the removal of the owner.

The opinion of the court below was, that the oath ought to have been taken within sixty days after the removal of the negro.*

* The opinion of the court below seems to have been misunderstood by the counsel. The grounds upon which that court decided, are believed to be, not that the *son* was bound to take the oath within sixty days after the removal of the slave by the father, but that the *father* ought to have taken the oath within sixty days after *his* removal with the slave. The act does not require the oath to be taken by the person who has the absolute property of the slave, but by him who brings a slave into the state. The words of the oath are, "nor have I brought *with me any* slaves with an intention of selling them." The *son* might safely take the oath, and sell the slave immediately, for he did *not* bring the slave with him. The son would not have been liable to the penalty of 200 dollars under the 3d section, because he did *not* import the slave: but the *father* would, because he *did* import him.

C. Lee, contra. The general rule is, that a slave imported shall be free. Is the present case within the exception?

The father, being in possession of the slave, claiming title and exercising authority as owner, brought him from Maryland into Alexandria. If he did so without authority from the son; and if the son was the true owner, and if the slave was lost by the negligence, or in consequence of the act of the father, he is liable to the son. The father, therefore, was a person to whom the effects of the 2d section would extend, and to save himself from those effects, it was his duty to have taken the oath prescribed by the 4th section.

The right to freedom which the slave acquires is not a mere penalty on the owner, but an independent right, not to be controuled by its consequences. The object of the act was to discourage, and gradually to abolish *slavery*; or, at least, to prevent its increase. Two means were adopted by the legislature. One was the prevention of further importations; the other was the emancipation of such as should be imported contrary to the act. This emancipation was not a *penalty* intended solely to *prevent* importation, but a *specific remedy* for the evil *after it had happened*. The penalty of 200 dollars, under the 3d section, was the *preventive* means, and the emancipation, under the 2d section, was the *remedial* means of accomplishing the object of the legislature. The evil was not the importation of freemen, but of *slaves*. To make slaves free was, therefore, as direct an accomplishment of their object, as to prevent their importation. The act could not intend that the right to freedom, given by the 2d section, should depend upon a title litigated between two persons, each claiming to be the owner. The words are, "Slaves which shall hereafter be *brought* into this commonwealth"—not by their *owners*, but by any person claiming and exercising authority over them. If a stranger should take a slave from Maryland, claiming title, and bring him into Virginia, and keep him there a year, the slave must, under the 2d section of the act, be free. And the remedy of the true owner must be against the wrong doer, in the same manner as against a man who should, without authority, take his slave from Maryland, and in attempting to cross the Potowmack, the slave should be drowned. So, in this case, if the father, without authority from the son, brought the slave from Maryland into Alexandria, and the slave thereby gains his freedom, by the negligence of the father, the father is liable to the son. The right of the slave to his freedom does not depend upon the crime of the person who may in law be adjudged to be the true owner. It is sufficient for the slave to show that the person, in whose *possession*, and under whose *controul* he was, and who *claimed* and *exercised* over him the authority of an owner, has violated the law, and done the act which, by law, confers upon him his freedom. The consequential damage to the true owner cannot affect the slave. *He* was not the cause of the injury. The true owner must look to the author of the injury, against whom the laws have provided him a remedy.

Scott v. Negro London

year from the time the negro was brought in, and also within the sixty days from the time the plaintiff in error removed to Alexandria, the oath prescribed by the law was taken.

No right to freedom having vested in London at the time this oath was taken, the question is, has it brought the plaintiff within the proviso of the act?

That the plaintiff is within the letter of the proviso, is unquestionable. He is a person who inclined to remove from one of the United States, into Virginia, who actually did remove, and who took the requisite oath within the limited time.

But it is contended, in behalf of the defendant in error, that the acts of bringing the negro into the state, and of removing into it, must be concomitant, in order to bring the case within the proviso: Or in other words, that the owner must be a person "inclining to remove into the state," at the time the slave was brought in. This inaccuracy of construction seems to be founded on the idea, that the penalty of forfeiting the property, accrues on bringing the slave into the state, whereas, it attaches on his continuance in the state for twelve months. Till such continuance has taken place, the offence has not been committed. If then, all the acts which bring a person within the proviso, are performed before the right to freedom is vested, and before the provisions of the act have been infracted, it seems to the court, that the rights of the party remain unaffected by the act.

If London had been ordered to Maryland for a day, and then brought with his master into Alexandria, the construction of his counsel would be satisfied; and it seems strange, where the letter of a law has not been violated, that such an unimportant circumstance should affect its spirit.

Unless this mode be admitted, of coming within the proviso, a person inclining to remove into Virginia, whose slaves had preceded him, though not for one year, could not bring himself within, or avoid the forfeiture, although permitting them to come into that state was no

offence; a construction of the act which the court cannot think consistent with its spirit or letter.

Scott v. Negro London.

This court is, therefore, of opinion, that the circuit court erred in directing the jury that, under the circumstances stated, the plaintiff below was entitled to his freedom, and doth reverse the judgment rendered by the circuit court, and remand the cause for further proceedings.

Judgment reversed.

WISE v. WITHERS.

Wise v. Withers.

A justice of the peace, in the district of Columbia, is an officer of the government of the United States, and is exempt from militia duty.

The court martial has not exclusive jurisdiction of that question, and its sentence is not conclusive.

Trespass lies against a collector of militia fines, who distrains for a fine imposed by a court martial, upon a person not liable to be enrolled in the militia. the

ERROR to the circuit court of the district of Columbia, in an action of trespass *vi et armis*, for entering the plaintiff's house, and taking away his goods. The defendant justified as collector of militia fines. The plaintiff replied, that at the time when, &c. he was one of the United States justices of the peace, for the county of Alexandria. This replication, upon a general demurrer, was, by a majority of the court below, adjudged bad; whereupon the plaintiff sued out a writ of error, and the questions made on the argument were,

1. Whether a justice of the peace, for the county of Alexandria, was liable to do militia duty? and

2. Whether an action of trespass will lie against the officer who makes distress, for a fine assessed upon a justice of the peace by a court martial?

C. Lee, for the plaintiff in error. This case depends upon the act of congress of *March 3d*, 1803, entitled "an act, more effectually to provide for the organization of the militia of the district of Columbia," *vol. 6, p. 237.*

WISE v. WITHERS.

court martial having no jurisdiction in such cases.

The 6th section says, "that the commanding officers of companies, shall enrol every able bodied white male, between the ages of eighteen and forty-five years, (*except such as are exempt from military duty, by the laws of the United States*) resident within his district."

The act of congress of the *8th of May*, 1792, *vol.* 2, *p.* 93, § 2, exempts from militia duty, "The Vice-President of the United States; *the officers, judicial and executive, of the government of the United States;* the members of both houses of congress, and their respective officers; all custom-house officers, with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen, employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners actually employed in the sea-service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective states."

This act applies not only to such officers as then existed, but to all such as might thereafter be created.

If the plaintiff is an officer, judicial or executive, of the government of the United States, he is exempted.

In *Marbury's case*, *ante*, *vol.* 1, *p.* 168, this court decided, that a justice of the peace, for the district of Columbia, was an officer, and that he became such as soon as the commission was signed, sealed, and ready to be delivered. If the commission, therefore, is a criterion, to decide who is an officer, we are at a loss to conceive what objection can be taken.

The justices of the peace for the district of Columbia, are appointed by the president of the United States, by and with the advice and consent of the senate, and are commissioned by the president. Their powers and duties are prescribed by the act of congress, "concerning the district of Columbia, *vol.* 5, *p.* 271, § 11. Whether those powers are judicial or executive, or both, is immaterial.

Jones, contra.

1. A justice of the peace, in the district of Columbia, is not a *judicial* officer of the *government* of the United States.

By the act of congress, those appointed for the county of Alexandria, are to exercise the same powers and duties as justices of the peace in Virginia. The expression in the act of 1792, "officers judicial of the government of the United States," means only the judges of the supreme and inferior courts of the United States. Justices of the peace in the states are not considered as judicial officers. By the constitution of Massachusetts, the judicial officers are to hold their offices during good behaviour, and yet the commissions of justices of the peace are limited to seven years. So the constitution of the United States says, that the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour; but by the act of congress, the justices of the peace in the district of Columbia, are to hold their offices only for five years. These justices, therefore, are either not judges, or the constitution has, in this respect, been violated. It is plain, however, that congress did not consider them as judges. A sheriff sometimes acts as a judicial officer in holding elections; and some of the officers in the executive departments, exercise judicial functions in many cases, but they are not, therefore, judges. An act of congress may give judicial powers to certain officers, but they are not, therefore, judges.

2. He is not an executive officer "of the *government* of the United States." This description was intended, by the act of 1792, to comprehend only the officers of the superior departments, or those which strictly constitute the government of the United States, in its limited sense. This is to be inferred, because the act goes on to enumerate by name, all the inferior officers which it meant to exempt. Why *enumerate*, if the general description comprehended the whole?

3. The circuit court of the district of Columbia has not jurisdiction of this question. The question who is

WISE v. WITHERS.

to be enrolled in the militia, and the assessment of the fines, are matters submitted exclusively to the courts martial, which are courts of peculiar and extraordinary jurisdiction, specially appointed for that purpose, by the act of congress, *vol.* 6, *p.* 244, § 8. The words are, the "presiding officer shall lay before the said court (the battalion court of inquiry) all the delinquencies as directed by law, whereupon, they shall proceed *to hear and determine.*" There is no provision for revising the decisions of those courts martial.

They are final and conclusive, like those of an ecclesiastical court, or a court of admiralty.

If they have jurisdiction, and especially if they have exclusive and final jurisdiction in the case, the officer who executes their orders is justified. He cannot be considered as a trespasser.

C. Lee, in reply. There can be no doubt but the plaintiff is an officer. There can be as little that he is an officer judicial or executive, or both; and if he is not an officer of the government of the United States, he is not the officer of any other government. There is no distinction between an officer of the United States, and an officer of the *government* of the United States. An officer appointed by the president of the United States, to an office created by a law of the United States, and exercising his authority in the name of the United States, must be as much an officer of the government of the United states, as any other officer in the United States.

The reason of enumerating other officers by name, was, because it might, perhaps, be doubted, whether they would come under the general description of officers judicial and executive.

As to the jurisdiction of the circuit court. A limited power given to certain tribunals, not extending to all persons, cannot controul the general jurisdiction given to that court.

Whenever a peculiar limited jurisdiction is given to certain persons, and they exceed it, not only their

officers, but they themselves are liable to an action. They are all subject to the general law of the land. If this were not the case, and a court martial should compel a man of more than forty-five years of age, for example, to perform militia duty, and continue to fine him from time to time, there would be no redress.

The court martial in the present case, had no jurisdiction over the person of the plaintiff. He was exempt, and, therefore, they could delegate no authority to their officer.

February 19.

MARSHALL, Ch. J. delivered the opinion of the court.

In this case two points have been made by the plaintiff in error.

1st. That a justice of the peace, in the district of Columbia, is, by the laws of the United States, exempt from militia duty.

2d. That an action of trespass lies against the officer who makes distress, in order to satisfy a fine assessed upon a justice of the peace, by a court-martial.

1. Is a justice of the peace exempt from militia duty?

The militia law of the district refers to the general law of the United States, and adopts the enumeration there made, of persons who have this privilege. That enumeration commences with "the Vice-President of the United States, and the officers judicial and executive of the government of the United States."

It is contended by the plaintiff, and denied by the defendant, that a justice of the peace, within the district, is either a judicial or an executive officer of the government, in the sense in which those terms are used in the law.

It has been decided in this court, that a justice of the peace is an officer; nor can it be conceived, that the affirmative of this proposition, was it now undecided, could be controverted. Under the sanction of a law, he is appointed, by the president, by and with the advice and consent of the senate, and receives his commission from the president. We know not by what terms an officer can be defined, which would not embrace this description of persons. If he is an officer, he must be an officer under the government of the United States. Deriving all his authority from the legislature and president of the United States, he certainly is not the officer of any other government.

But it is contended, that he is not an officer in the sense of the militia law; that the meaning of the words "judicial and executive officers of the government," must be restricted to the officers immediately employed in the high judicial and executive departments; and, in support of this construction, the particular enumeration which follows those words, is relied on; an enumeration which, it is said, would have been useless, had the legislature used the words in the extended sense contended for by the plaintiff. A distinction has also been attempted between an officer of the United States, and an officer of the *government* of the United States, confining the latter more especially to those officers who are considered as belonging to the high departments; but, in this distinction, there does not appear to the court to be a solid difference. They are terms which may be used indifferently to express the same idea.

If a justice of the peace is an officer of the government of the United States, he must be either a judicial or an executive officer. In fact, his powers, as defined by law, seem partly judicial, and partly executive. He is, then, within the letter of the exemption, and of course must be considered as comprehended within its proper construction, unless there be something in the act which requires a contrary interpretation. The enumeration which follows this general description of officers, is urged as furnishing the guide which shall lead us to the more limited construction. But to this

argument, it has very properly been answered, by the counsel for the plaintiff, that the long enumeration of characters exempted from militia duty which follows, presents only *one* description of persons; custom-house officers, and those who hold a commission from the President, or are appointed by him; and of these, by far the greater number do not hold such commission. The argument, therefore, not being supported by the fact, is inapplicable to the case.

The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the district of Columbia, is exempt from the performance of militia duty.

It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled: and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.

The judgment is reversed, and the cause remanded for further proceedings.

THE UNITED STATES *v.* GRUNDY AND THORNBURGH.

ERROR to the circuit court of the United States, for the district of Baltimore, in an action for money had and received for the use of the United States, by the defendants, as assignees of Aquila Brown, jun. a bankrupt; it being money received by the defendants for the sale of the ship *Anthony Mangin*, which ship the United States alleged was forfeited to them by reason that Brown, in

Under the act of Congress of Dec. 31, 1792, which declares, that if a false oath

THE UNITED STATES v. GRUNDY AND THORNBURGH.

order to obtain a register for her, as a ship of the United States, had falsely sworn that she was his *sole* property, when he knew that she was in part owned by an alien.

On the general issue a verdict was rendered for the defendants, and the plaintiffs took three bills of exceptions.

be taken in order to procure a register for a vessel, the vessel or its value shall be forfeited, the United States have an election to proceed against the vessel as forfeited, or against the person who took the false oath, for its value. But until that election is made, the property of the vessel does not vest in the United States; and the United States cannot maintain an action for money had and received against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel and received the purchase money, before seizure of the vessel.

1. The *first* stated that they gave in evidence to the jury, that on the 25th of November, 1801, and for several months before and after, *Aquila Brown, jun.* a citizen of the United States, and *Harman Henry Hackman*, a subject of the elector of Hanover, were copartners in merchandize, and carried on trade at Baltimore, under the firm of *Brown and Hackman*, and that *Brown*, at the same time carried on trade at Baltimore on his separate account, under the firm of *A. Brown, jun.* That before that day, and during the year preceding, the ship *Anthony Mangin* was built, rigged, and equipped, within the United States, for the house of *Brown and Hackman*, under a contract made for them and under their authority, and was paid for with their funds, and that on that day *Brown* applied to the Collector, for a register for that ship, in his own name and as his sole property, and for that purpose took and subscribed the usual oath, which contains an asseveration that he then was the true and only owner of that ship, and that no subject or citizen of any foreign prince or state, was then directly or indirectly interested therein, or in the profits or issues thereof: whereupon, a register was granted to him in the usual form. That afterwards, and after the 28th day of the same November, *A. Brown, jun.* as well as *Brown and Hackman*, were declared bankrupts, and their effects severally assigned—the defendants being the assignees of *A. Brown, jun.* The plaintiffs, in order to prove that the ship, at the time of taking the oath, was the property of the house of *Brown and Hackman*, and belonged in part to *Hackman*, an alien, offered *Hackman* himself as a witness, who objected to being sworn, alleging that he ought not to be compelled to give evidence against his interest. Upon the *voir dire* he explained his interest thus: That if the plaintiffs should recover in this action, the funds of the estate of *Brown* would be diminished by the whole amount recovered. That *Brown and Hackman* had drawn and indorsed bills of exchange to a large

amount, which had come to the hands of the United States by indorsement, and he believed himself to be liable therefor in case of failure of the funds of *Brown*. Whereupon, the court was of opinion that he was not a competent witness for the plaintiffs.

2. The second bill of exceptions stated, (in addition to the facts contained in the first) that the plaintiffs, in order to prove that at the time of the oath, the ship was the property of *Brown and Hackman*, offered to swear a witness to prove that in a book, purporting to be one of the books of account of *Brown and Hackman*, in the possession of one of the assignees of *Hackman*, who refused to produce it at the trial, although it was then in his possession, he saw an entry in the hand-writing of *Hackman*, purporting to be made on the 28th of November, 1801, charging the freight of the ship, on her then intended voyage, to the debit of *Brown*, and to the credit of *Brown and Hackman*. But the court rejected the evidence as inadmissible for that purpose.

3. The third bill of exceptions (in addition to the facts contained in the former bills) stated that the plaintiffs offered to prove, that at the time of *Brown's* taking the oath and obtaining the register in his own name, the ship was owned in part by *Hackman*, an alien, and that *Brown* knew the fact to be so. That afterwards, and before the bringing of this action, *Brown* became bankrupt and his effects were assigned to the defendants. That at the time of his bankruptcy, and of the assignment, the ship was in his possession, and that by virtue of the assignment the defendants took her into their possession as part of the estate of *Brown*, and sold her to a certain *Thomas W. Norman*, for 18,250 dollars, which sum they received, and at the time of trial had in their possession.

The defendants then gave in evidence, that after the sale of the ship to *Norman*, the United States seized her as forfeited; and libelled her in the district court. That *Norman* filed his claim, and upon proof and hearing, the judge dismissed the libel. That no action had ever been instituted by the United States against *Brown*.

Whereupon, the attorney for the United States prayed the court to direct the jury that if they believed the mat-

THE UNITED STATES v. GRUNDY AND THORNBURGH.

ters so offered in evidence on the part of the United States, the United States were entitled to recover, in this action, the said sum of 18,250 dollars, which direction the court refused to give; but instructed the jury that if they believed that any of the matters of fact in the oath of *Brown* alleged, were within his knowledge, and were not true, the said evidence given by the plaintiffs was not sufficient, in law, to maintain the present action.

Breckinridge, Attorney-General of the United States.

The great question in this cause is, whether the property of the ship *Anthony Mangin*, vested in the United States, upon the commission of the act of forfeiture by *Brown*, *without a sentence of condemnation.*

This action is founded on the act of December 31st, 1792, "for registering and recording of ships and vessels." *Laws U. S. vol. 2, p. 135.* We contend that under the 4th section of this act, no sentence of condemnation was necessary to vest the property in the United States. This section, after stating the nature of the oath required in order to obtain a register of the ship, says, "And in case any of the matters of fact in the said oath alleged, which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which the same shall have been made, *or of the value thereof*, to be recovered (with costs of suit) *of the person by whom such oath shall have been made.*"

A forfeiture by statute is analagous to a forfeiture at common law. At the common law, by an outlawry, the property of the outlaw immediately vests in the crown without office found. *Co. Lit.* 128. (*b.*)

The English court, upon the statute of 12 *Car.* 2, *c.* 18, which creates forfeitures very similar to those of our statute, have decided that by the act of forfeiture, the property is so completely divested from the owner and vested in the crown, that *detinue* can be maintained for it. 5 *Mod.* 193, *Roberts* v. *Withered. Comb.* 361. *S. C.* 12 *Mod.* 92. *S. C.* 1 *Salk.* 223. *S. C.* And *Rookby* J. said "the property is divested out of the owner, by importa-

tion, but not vested in him that sues until bringing the action, or seizure." That case has been recognised and made the ground of decision in a late case. *5 T. R.* 112, *Wilkins* v. *Despard.* These cases decide that the right to recover either the specific goods, or their value, does necessarily give to the court the right to determine the question of forfeiture.

If the right of the United States was only inchoate at the commencement of the suit, the judgment in this case would have completed it as effectually as a sentence of condemnation. The United States might have proceeded either *in rem*, or for the *value* of the ship. They might either *seize* and libel the *ship*, or *sue the person.*

In the case of seizure of a ship under the act of August 4th, 1790, *Laws U. S. vol.* 1, *p.* 237, there must be a prosecution in conformity with the regulations of the 67th section of that act; and an important question arises, whether we are thereby prevented from proceeding *in personam* for the value of the thing forfeited. We contend, that we may proceed either way; for of what use are the words "*or the value thereof*," if the recovery must be by seizure and condemnation? The words being in the alternative, leave us that option. In *Roberts* v. *Withered*, it is said, "that though some persons proceed by way of information upon forfeitures, yet actions of *detinue* will, nevertheless, lie." *5 Mod.* 194. Suppose the act had declared, that the party shall forfeit 1,000 dollars, would not an action lie for this money?

But admitting that the act of 1790 requires a sentence of condemnation to vest the right in the United States, we contend, that the 29th section of the act of December 31, 1792, under which the present action is brought, does *not*. *Laws U. S. vol.* 2, *p.* 157.

Although it refers to the act of 1790, it is only for the purpose of designating the *courts* in which the recovery is to be had; and to the *manner of disposing of the forfeiture.* It has no reference to the *kind of suit*, or to the *manner of proceeding*, to effect the recovery

THE UNITED STATES v. GRUNDY AND THORNBURGH.

of the object. The words of the 29th section are, "That all penalties and forfeitures which may be incurred, for offences against this act, shall and may be sued for, prosecuted, and recovered, *in such courts, and be disposed of in such manner*, as any penalties and forfeitures which may be incurred for offences against the act (of 1790) may legally be sued for, prosecuted, recovered and disposed of."

The statute of 12 *Car.* 2, has stronger expressions to show, that a sentence of condemnation was necessary to vest the property. Its words are, "under the penalty of forfeiture of ship and goods, one moiety to his majesty, and the other moiety to him or them that shall *inform, seize*, or sue for the same." Our statute is not only *silent* as to the mode of recovery, whether by information, seizure, or suit, but contains the words "*or the value thereof*," (which the British statute does not) and, therefore, recognises any mode of recovery, by which that value can be obtained.

It is not unworthy of remark, that vessels are, by the act of 1790, rendered liable to forfeiture in three cases, § 14, 27 & 60, in neither of which is it declared, that "*the value thereof*" may be recovered. The 67th section, if intended to ascertain the forfeiture of ships by seizure and condemnation only, may operate consistently on that act, but it cannot, where an alternative is given to sue for the value.

As we cannot proceed *in rem* without a seizure, if a transfer or sale secures the property in the transferee, or vendee, the law will, in this respect, be defeated.

Admitting that the vendee is safe, the offender is liable to be proceeded against *in personam*, for the value of the property forfeited: If so, his assignees, in case of his bankruptcy, are also; for his creditors have but an *equitable lien* on his estate in the hands of his assignees; and the United States have a *legal right*, which, after suit brought, has relation back to the time of the forfeiture.

With respect to the exceptions to the *witnesses*, the court, in rejecting the testimony of *Hackman*, have carried the doctrine farther than it is warranted by any precedent. It was, in fact, deciding that a witness may refuse to give testimony against a defendant, because that defendant is his debtor, and his testimony, by establishing the plaintiff's claim, would diminish the funds out of which the witness's claim might be satisfied.

This interest is certainly too remote and contingent to exclude the witness. It may, perhaps, affect his credibility, but not his competency.

The other witness, who was called to prove the entry in the books of *Brown & Hackman*, was also improperly rejected.

After the rejection of *Hackman* himself, and after proving the book to be in the possession of the opposite party, who refused to produce it, the next best evidence was the testimony of a person who had seen the entry in the book, in the hand-writing of *Hackman*.

The judgment of the district court upon the libel, is no bar to the present action. That judgment was not given on the point of the forfeiture, but upon the ground that the United States could not follow the *thing itself* into the hands of a *bona fide* purchaser, for a valuable consideration, without notice. It does not bar the remedy *in personam*.

P. B. Key, and *Martin*, contra.

1. As to the rejection of *Hackman*, as a witness.

He was offered by the United States, to prove that he was an alien, and was interested in the ship at the time the oath was taken by *Brown*. The defendant objected, and, upon the *voir dire*, he declared himself interested, and objected to answering against his interest. [*Key* was about to read an authority, when the Ch. J. told him that no authorities would be required, on that point. *Johnson*, J. said he should

THE UNITED STATES v. GRUNDY AND THORNBURGH.

like to see the authority, for his own satisfaction. *Marshall*, Ch. J. When we said there was no necessity for authorities, we meant, authorities to prove that a man, in a civil case, is not bound to testify against his interest. But this does not preclude the objection, that the facts stated by the witness, as the ground of his interest, did not prove him to be interested. *Key* then cited *Peake's Law of Ev.* 132.]

2. As to the rejection of the witness who was called to prove the entry in the books of *Brown & Hackman*.

There was no proof that it was one of the books of that firm; nor was any notice given to the defendants to produce it. It was not proved to be in the possession of the defendants, but in that of the assignees of *Brown* and *Hackman*, who were different persons. The plaintiffs might have had a *subpœna duces tecum*. The ground of the opinion of the court was, that the testimony offered was not the best evidence, as the book itself might have been had.

3. The important question in the cause is, whether, by the act of forfeiture, the property vested in the United States before condemnation?

We admit, that the owner of property may maintain trover against a vendee claiming under a third person, and disaffirm the sale; or he may affirm the sale, and bring an action for the price. The present action is grounded on the right of property being in the United States at the time of the sale. The seizure of the vessel was not made, by the United States, until after the assignees of *Brown* had sold and delivered her to a third person.

If the present action is not founded on the right of property, the action should have been *debt* for the penalty, or a special action on the case, grounded upon the statute, and averring every matter necessary to entitle the United States to recover.

The right of the United States to the property depends upon the act of 1792. The 4th section, which declares the forfeiture and penalty, is silent as to the remedy. When the act creating a penalty is silent as to its mode of recovery, the action must be debt or case on the statute.

The only remedy, then, which the United States had, was either by a seizure of the ship, or an action of debt, or special action on the case, for the penalty. But the present is an action for *money had and received.* It is not grounded on a crime or a tort.

The United States have lost their remedy *in rem*, by suffering it to be sold without notice. Upon this point, the sentence of the district court, which has been acquiesced under, is conclusive; for it goes upon the ground, that the United States had not the right to the thing at the time of the sale; for if they had, the vendee gained no legal title, and, therefore, could not be protected by the want of notice. But he was protected by want of notice; he must, therefore, have gained a legal title, which could be protected. He could gain his legal title only from the assignees, but they could not convey a legal title which was not in them. At the time of sale, therefore, the legal title must have been in the assignees; and, as there could not be two legal titles to the same thing, at the same time, in different persons, the title could not be in the United States. This is the consequence which inevitably results from the sentence.

Having lost their remedy against *the thing*, their only alternative is an action for the penalty against *the person* who took the false oath. The act provides no substitute for the process *in rem*, but the action against *that* person; it gives no right of action against the person who may be in possession of the thing.

No action for the penalty will lie against *Brown's* assignees. It is in the nature of a criminal prosecution.

THE UNITED STATES v. GRUNDY AND THORNBURGH.

The act gives the United States an election of one of two remedies, but not of both. They may proceed *in rem*, or *in personam*. Until their election is made, the *thing itself* is not forfeited, for they may never choose to proceed against the thing, but may prefer the remedy against the person.

They have made their election by proceeding *in rem*; having failed there, they could not take the other side of the alternative, and sue for its value. The sentence has been submitted to, and is conclusive until reversed.

Suppose the libel had been dismissed because it was not sufficiently proved that *Brown* had sworn falsely, or that he *knew* he was swearing falsely, could the United States turn round, and try the same question again, upon an action against *Brown* for the penalty? Or, after suing *Brown* for the penalty, and failing to recover judgment against him, could they seize the ship and try the question over again?

A judgment, until reversed, is conclusive as to the subject matter of it, 2 *Bur.* 1009, *Moses* v. *Macferlan.*

At common law a forfeiture does not alter the property, until there is some act done by the party claiming the forfeiture, either *in pais*, or of record.

A forfeiture of lands relates back to the time laid in the indictment; but the forfeiture of goods relates to the time of conviction. In both cases the time must appear *of record. Co. Lit.* 390. *(b.)* 391. *(a.)*

In case of *deodand*, nothing is forfeited until it be found by inquest. So in the case of *felo de se*, no part of the personal estate is forfeited to the king, before the self-murder is found by inquisition. So in the cases of *flight*, and of *goods waived*, 1 *Hawk. P. C.* 101, 104.

The case of *Roberts* v. *Withered*, 5 *Mod.* 193, was decided on the ground that an action of *detinue* was a process *in rem*, and equivalent to a seizure.

Harper, in reply.

1. As to the exclusion of *Hackman's* testimony.

It may, perhaps, be safely admitted that if the testimony has an *immediate*, *direct*, and *certain* effect upon his interest, a man may be excused from testifying. But in the present case it depended upon several contingencies. 1st. Whether Brown's estate would be sufficient to pay the claim of the United States. 2d. Whether *Hackman's* certificate would bar the United States; a point not yet decided, and upon which legal opinions differ. 3d. Whether the United States would choose to resort to *Hackman* until the effects of *Brown* were exhausted; and, 4th. Whether there would be any surplus of *Hackman's* estate. The authority from *Peake*, 132, is not to the point; for he says, that the testimony must go to *establish a debt* against himself, before the witness can be excused from giving it. And the case which he cites from *Strange*, 406, shows that it is only a matter of *indulgence*, and not of *right*, even in such a case: for although the witness was bail in the action, yet if he was a subscribing witness, the *Chief Justice* said he would oblige him to swear.

2. As to the testimony respecting the book.

It was proved that the book was in the hands of the assignee of *Hackman*, who refused to produce it. We could not issue a *subpœna duces tecum*, because the book was a private document; and it not being in the possession of the defendants we could not compel them to bring it in under the act of Congress. Between a bankrupt and his assignees, there is a perfect privity as to all matters of contract and interest. The book, therefore, must be supposed to be in the hands of *Hackman*; and as the court refused to compel him to testify, or to produce the book, evidence of its contents was the next best evidence in our power. As to this case, it was as if the book had been lost or destroyed. If a subscribing witness to a bond, be out of the reach of the process of the court, you cannot compel him to testify, but you may give evidence of his hand-writing.

3. As to the main question.

THE UNITED STATES v. GRUNDY AND THORNBURGH.

The defendants are not sued *as assignees*. The action is against them in their *own right*, as having received money to which the United States are entitled. We say that they have taken property of the United States, and sold it, and we are entitled to the money.

The forfeiture of *the value* is to be recovered of the person who took the oath; but this does not prevent the United States from pursuing such other remedies as they might have had by reason of the forfeiture. If, then, the forfeiture gave the United States the right to the thing, they are entitled to the present remedy.

The question is, at what time did the property vest in the United States, by reason of the forfeiture?

The case in 5 *T. R.* refers to, and recognises the law as decided in *Roberts* v. *Withered*, in 5 *Mod.* The decision there, was, that by the illegal act of the party the property was divested out of him. The doctrine of *abeyance* does not exist in any case: it has been laughed out of existence. The property must be somewhere. If it does not vest in a private owner, it goes to the sovereign, or to the government. If divested out of the owner, it goes *eo instanti* to the person to whose use it is forfeited. When the forfeiture accrues to a private person, he must do some act to entitle himself. But not so in the case of the king; it vests in him immediately. He is not bound to do any act. In the case of *Roberts, qui. tam.* v. *Withered*, 5 *Mod.* the right of the informer did not accrue till the action brought; but the whole had gone to the king by the forfeiture. The offence divests the property, but it is not vested in an informer until action brought. In the mean time it is in the king. The informer's right only vests by action.

There is a difference between a forfeiture by statute, and a forfeiture by common law. The common law says, the king shall have it if he will. But the statute says, it shall absolutely vest in the king. By the statute, the king, speaking by the legislature, has determined his will. He has made his election to have the thing. But the statutory remedy does not take away the common law remedy: it is cumulative. The United States are not obliged to resort to the statutory remedy.

But it is said, that the United States had an election, and that no right to the thing vested until they made their election. We may admit it; but we say we have elected the present remedy.

Admit that we elected to seize the vessel. It had escaped: it was gone out of our power. It was still an election, and we are now proceeding in an action for its value. The election will relate back. We have the whole three years to make the election. If we pass the three years, the property *goes back* to the former owner.

The *value* is not to be considered as a penalty, but as a debt. We might have brought *detinue* or *trover*, for the ship, instead of an action for the value, or a seizure.

We admit the sentence cannot be inquired into; but it does not affect the present question. The decision was not on the point of the forfeiture.

February 22.

MARSHALL, Ch. J. delivered the opinion of the court.

This action is brought to recover money, received by the defendants, for a ship sold by them as the assignees of Aquila Brown, a bankrupt: which ship is considered, in this cause, as having been liable to forfeiture, under the "Act for registering and recording ships or vessels." It is founded on the idea that, at the time of sale, the ship was the property of the United States, in virtue of the act of forfeiture which had been committed, and of the proceedings of the United States in consequence of that act.

It appears that in 1801, Aquila Brown, jun. then carrying on trade in his own name, in Baltimore, obtained a register for the *Anthony Mangin*, as his sole property; having first taken the oath which the law requires, to enable him to obtain such register. He afterwards became a bankrupt, and the *Anthony Mangin* passed, with his other effects, to his assignees, who sold her for the money now claimed by the United States. After

this sale, facts were discovered, inducing the opinion that a certain Harman Henry Hackman, a foreigner, was part owner of the vessel, a circumstance within the knowledge of Aquila Brown; and upon this ground she was seized and libelled in the court of admiralty. By the sentence of that court, the libel was adjudged not to be supported, and was dismissed. It is agreed, and is so stated in the reasoning of the judge, which accompanied his opinion, that this sentence was not intended to decide the question of forfeiture; but was founded on the alienation of the vessel before the forfeiture was claimed. Acquiescing in this decision, the United States brought the present action. At the trial, the judge instructed the jury that this action was not maintainable, although they should be of opinion that the fact alleged in the oath, which was taken to obtain the register, was untrue within the knowledge of the person taking the oath. To this instruction an exception was taken; and upon that, among other points, the cause comes into this court.

The words of the act under which the right of the United States accrues are: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing, or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered with costs of suit, of the person by whom such oath or affirmation shall have been made."

The question made at the bar is, whether, by virtue of this act, the absolute property in the ship or vessel, vests in the United States, either in fact or in contemplation of law, on the taking of the false oath; or remains in the owners until the United States shall perform some act, manifesting their election to take the ship and not the value.

So far as respects this question, the effect of the sentence in the court of admiralty is put out of the case, for the court has not decided what the effect of that sentence will be.

It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until

some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence; but the distinction, taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, shall be the will of the legislature. This must depend upon the construction of the statute.

The cases cited from *5th Mod.* and *5th Durnford & East*, are certainly strong cases. Whether they can be reconciled to the general principles of English law, need not be considered, because the present inquiry respects the construction of an act of Congress, containing words which vary essentially from those used in the acts of the British parliament, on which those decisions were made.

The question, therefore, *does the ship vest absolutely in the United States, so as to make it their property, whether such be the choice of the government or not, or may they elect to reject the ship and proceed for its value*, must be decided by the particular words of the act.

The words taken according to their natural import, certainly indicate that an alternative is presented to the United States. "There shall be a forfeiture of the ship, or of the value thereof, to be recovered with costs of suit, of the person by whom such oath shall have been made."

Had a special action on the case been brought against the person, by whom the oath was made, stating circumstances on which a forfeiture would arise, and averring an election on the part of the United States, to claim the value, it would be a very bold use of the power of construction which is placed in a court of justice, to say, that such an action could not be maintained, because the vessel itself was vested in the government, and the value was only given in the event of the vessel being withdrawn from its grasp.

In addition to the obvious and natural import of the words used by the legislature, the opinion, that an alternative is given to the government, derives some strength from the consideration, that the forfeitures are claimed from distinct persons. If the ship be forfeited she is claimed from all the owners. In an action for the *Anthony Mangin*, Harman Henry Hackman could not have defended himself by averring his interest in the vessel, and that only the share of Brown was forfeited; but in an action against Hackman, for the value, the declaration, or information, must have averred that he was the person who took the false oath, and proof that it was taken by his partner would not have supported that averment. They are, then, distinct forfeitures, claimed from different persons. The ship, from the owners; the value from the particular owner who has taken the false oath.

The United States are entitled to both, or to only one of them. A right to both has not, and certainly cannot, be asserted. If there be a right only to one, the government may elect to take either; but till the election be made, the title to the one is perfectly equal to the title to the other.

It seems to be of the very nature of a right to elect one of two things, that actual ownership is not acquired in either, until it be elected; and if the penalty of an offence, be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering, materially, the situation in which that person is placed, to say, that either is vested in him before he makes that choice. If both are vested in him, it is not an election which to take, but which to reject; it is not a forfeiture of one of two things, but a forfeiture of two things, of which one only can be retained.

That the legislature may pass such an act, is certain; but that the one under consideration, is such an act, is not admitted by the court.

If the property in the vessel was actually vested in the United States by the commission of the offence, then the judgment of a court, condemning the vessel,

or declaring it to belong to the government, would, in fact, do nothing more than ascertain that the offence had been committed; it would not vest the thing more completely in the government, in point of right, than it was vested by the commission of the offence. If, notwithstanding the complete ownership of the vessel, which the argument supposes in the government immediately upon the act of forfeiture, and in virtue of that act, a suit for the value might have been maintained, it would seem to follow that a judgment declaring the vessel to be the property of the United States, would not bar an action for the value, provided the benefit of that judgment had not been received by the United States.—The real principle on which an action for the value can be maintained would seem to be that the ship itself did not belong to the United States in consequence of the false oath, but in consequence of the election to take the ship. If this election be not made, and the government shall elect the value, then the property of the vessel remains in the original owners, and is no obstacle to a suit for the value. But if this opinion be mistaken; if the property in the ship be immediately invested in the government, notwithstanding which the value may be claimed, the court cannot distinctly perceive why the same action might not be maintained, notwithstanding the declaration of a court that the property was in the United States, provided the benefit of their judgment was not obtained. In this view of the case, if the court of admiralty had decreed in favor of the United States, and the *Anthony Mangin* had been destroyed before the benefit of that judgment had been received, the person who had taken the false oath, might still have been sued for the value. This would never be contended; and yet if the absolute ownership of the vessel by the United States does not preclude a right to sue for the value before a judgment be rendered, there is some difficulty in discerning when it will preclude that right. In fact, the idea that one of two things is actually vested in government by an act to which forfeiture is attached, seems incompatible with the idea of a right to elect which of two things shall vest.

It seems, then, to be the necessary construction of the act of congress that the United States acquired no

THE UNITED STATES v. GRUNDY AND THORNBURGH.

property in the *Anthony Mangin* until they elected to pursue that part of the alternative given by the statute. Of consequence, the money for which that vessel was sold, was not, at the time, received for the use of the United States; but for the use of the creditors of the bankrupt.

To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case, that an election subsequent to the sale shall carry back the title of the United States to the commission of the act of forfeiture, so as by this fiction of law to make them the real owners of the vessel at the time of sale, and consequently of the money for which she was sold?

Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the *Anthony Mangin* to the act of forfeiture, the title to the *Anthony Mangin* must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable by the doctrine of relation in lieu of the *Anthony Mangin*?—Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

The court will not inquire whether an action on the case against *Grundy & Thornburgh*, for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown. But some objections to it may be stated which deserve consideration. It certainly gives no notice of the nature of the claim, a cir-

cumstance with which, in a case like this, the ordinary rules of justice ought not to dispense. It asserts a claim founded on a crime yet remaining to be proved, not against the person who has committed that crime, or against him who possesses the thing which is liable for it, but against those who, though the assignees of the effects, are not the assignees of the torts committed by the bankrupt. It may change the nature of the defence.

The court suggests these difficulties as probably constituting objections to the action, without deciding on them. The points previously determined show that it is not maintainable in this case, under that alternative of the statute which subjects the vessel to forfeiture.

It remains to be inquired whether it can be maintained under the provision which gives a right to sue for the value.

Upon this part of the case no doubt was ever entertained. Not only must the declaration specially set forth the facts on which the right of the United States accrued, and the law which gives their title, but the action must be brought against the person who has committed the offence. Discarding those words which relate to other objects, and reading those only on which the claim to the value is founded, the statute enacts that "in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the value of the vessel, in respect to which the same shall have been made, to be recovered, with costs of suit, of the person by whom such oath shall have been made." It certainly requires no commentary on these words to prove that an action for the value can only be supported against the person who has taken the oath.

It being the opinion of the court that this action is not maintainable under any proof offered by the plaintiffs, it was deemed unnecessary to inquire whether the other exceptions in the record be well or ill founded.—

THE UNITED STATES v. GRUNDY AND THORNBURGH.

Without declaring any opinion respecting them, the judgment of the circuit court is affirmed.

Judgment affirmed.*

* The opinion of *Judge Winchester*, in the case of *the United States* v. *the Anthony Mangin, Norman, claimant*, referred to in the argument, was as follows:

The libel is grounded on the statute, for enrolling and registering ships and vessels.

The proceeding being *in rem*, all the world become parties to the sentence, as far as the right of property is involved; and of course, all persons any wise interested in the property in question, are admissible to claim and defend their interests.

The libel states the cause of action, with all the averments necessary to support the affirmative allegation, that a forfeiture has accrued.

The only claimant intervening in this cause, is *T. W. Norman*, who alleges himself to be a purchaser *bona fide, for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase*; and under *such* purchase, *i. e. bona fide, and for valuable consideration*, claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits.

On these proceedings, several questions of law have been raised and argued by the counsel; and as the great point in the cause does not appear to have ever received, either in this country or Great Britain, any direct judicial determination, I have, with great diligence, examined into the questions, which, from the breaking the cause, I saw must necessarily be involved in the determination.

The opinion which I am now to give, though the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court, upon a new, great, and important legal question, and which will probably receive, as it ought, the ultimate judgment of the supreme court.

It is necessary to keep in different views, the questions of fact, in issue, the questions of law arising from those facts, and the *parties* between whom they arise.

It is to be distinctly remembered, that *A. Brown*, whose wilful perjury is alleged to sustain the forfeiture sued for, is no party to this suit; neither are his assignees, in any shape, parties to this suit, to be *directly* affected by the judgment. Every consideration, therefore, which would support a prosecution against the actual offender, to recover the penalty of his wilful crime, or which might be alleged against those who stand in his situation, as privies in law *quo ad* the forfeiture, must be laid out of the case.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA *v.* JOHN AND JAMES H. TUCKER.

ERROR to the circuit court, of the district of Columbia.

This was an action of covenant, by John and James H. Tucker, on a policy of insurance, dated Sept. 1st, 1801, upon the sloop Eliza, *at and from Kingston, in Jamaica, to Alexandria, in Virginia.*

If a vessel be insured "*at* and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston, for *Baltimore* and Alexandria, and sails with intent to go first to *Baltimore*, and from thence to Alexandria, and before she arrives at the dividing point, is captured; it is a case of intended deviation only, and not of *non inception* of the voyage insured. It depends upon the particular circumstances of the case, whether, if the vessel be captured and recaptured, the loss shall be deemed *total* or *partial*.

The only parties to this suit are, the *United States and the informant*, as libellants, and *T. W. Norman*, as claimant of the ship.

I think it peculiarly necessary to confine my opinion to the state of facts, and the questions of law applying to the parties in court, because it is not necessary for me to decide, whether the assignees of *A. Brown* are clothed with any of the essential characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had; and the question *de bona fide emptoris*, does arise directly upon captain Norman's claim, and will determine this case. To that I shall, therefore, immediately proceed.

No seizure was made, or libel filed against the ship, until *after* Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration; nor until after he had obtained a new register in his own name, upon that purchase.

It is argued by the libellants' counsel, that Brown was not competent to pass any property to his assignees, nor they to any purchaser under them, as the forfeiture relates back to vest the property from the *time of the false oath*, and that the claim of the libellants is paramount to that of the claimant.

The defendant's counsel argue in support of his claim, that the relation back to the time of the offence, is never admitted to overreach rights intermediately acquired by third persons.

In commenting upon the case from 1 *D. and E.* 252, when the argument was first opened, Mr. Martin pressed very strongly the *dictum* of *Lord Kenyon*, that if the relation back to the time of an offence was admitted as to the property, it would, in every case, equally relate to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

The defendants pleaded, 1st. That the vessel never sailed on the voyage insured, and was not prosecuting the voyage insured, at the time of the capture; and, 2d.

for applying the argument *ab inconvenienti*, and as such I was forcibly struck with it when mentioned.

The manner in which *Lord Kenyon* is reported to have made this observation plainly shows it to be the declaration of a sudden impression, and which, though correct as applied to some *special cases*, is not so in the latitude reported, either at *common* law, the *civil* law, or in equity supported by policy.

1. At *common* law, even as to the guilty party, no attainder whatsoever has relation, as to the mesne profits of land, but only from the time of the attainder. 3 *Bac.* 272. *Co. Lit.* 290. (*b.*) 118. (*a.*)

2. By the *civil* law, and the rules of equity adopted from that code, a subsequent possessor is not only, not in a worse situation than those from whom he derives his possession, but even in cases where the original possessor might be bound to restore profit, a *bona fide* possessor is exempt from any such obligation; as in the case of a *bona fide purchaser*. *Bona fide emptor non dubie percipiendo fructus etiam ex re aliena, interim suos faciat, non tantum eos qui diligentia et opera ejus proveniunt, sed omnes; quia quod ad fructus attinet loco domini est.* *Zouch* 2. *J. C.* 213.

3. It would not be equitable or just in the abstract, to permit a legal owner to lay by, to avail himself of the ignorance of an innocent holder. And the same considerations of policy, which in England permit the offender and his family to enjoy the profits of lands forfeited for treason, which is a strong and acknowledged case of relation to the offence, least the land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offence, or only to the time of conviction.

As this reason against relation does not appear to have the force it carried at first view, we must have recourse,

1st. To the principles of decision in analogous cases; in their application, always having regard, (as was justly argued by Mr. Harper, on the motion to produce Brown's examination before the commissioners) "that a relation back shall never be admitted to injure the rights of *third persons*, nor to *protect or favour wrong*." And

2d. To the statute under which the forfeiture is claimed in this cause.

The adjudged cases on this subject, are six classes of offences, which incur a forfeiture of real estate; 2 *B. C.* 267, and seventeen which produce a forfeiture of personal property; 2 *B. C.* 421. In this numerous classification, the principle which governs each description of cases does not materially differ. I have, therefore, selected only,

A general performance of the covenants contained in the policy; upon which pleas the issues were joined, and verdict and judgment for a total loss.

1st. The cases of *outlawry*, and *attainder of crimes*; and, (as illustrative of these cases)

2d. *Waived goods.*

3d. Relation of executions at common law, and since the statute of Charles, and,

4th. (As involving the general doctrine of this case, and to explain the case of *Roberts* v. *Withered*, cited by Mr. Harper, from 5 *Mod.* 193. *Salk.* 223.) A case of villainage which governed that decision.

1. *Attainder*, or conviction of crimes, and *outlawry*.

Of this description there are two classes, which are adjudged to have relation to the time of the offence committed, and overreach all intermediate alienations—*treason* and *felo de se*. The case of treason, in which the forfeiture as to land relates to the time of the offence committed, depends upon feudal principles. As the land could not be aliened by the tenant voluntarily, it would be preposterous to admit that to be done, through the medium of a crime, which could not be done by a lawful act; and the power to sell, introduced by subsequent statutes, is construed as applying only to lawful alienations. The reason assigned in some books, that it shall relate to the offence, "because the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which, the same books admit, is only affected from the time of the conviction; and the time charged is traversable, even in the case of land, by third persons claiming an interest therein, 5 *Bac.* 228. *H. H. P. C.* 261, 262. 3 *Bac.* 271. *Plow.* 488. 8 *Co.* 170. *H. H. P. C.* 264, 270. 3 *Inst.* 230.

It is a proposition universally true, that the forfeiture, upon an attainder of treason, relates but to the conviction as to chattels, unless the case of the offender killed in resisting, or flight, form an exception, which may well be doubted. Indeed, says Lord Coke, it hath always been holden, that any one indicted of treason or felony, may, *bona fide*, sell any of his chattels, real or personal, 3 *Bac.* 271, *Perk.* 29. 8 *Rep.* 171. *Skinner*, 357, *Jones* v. *Ashhurst.* 4 *Com. Dig. Forfeiture, B.* 4. 2 *Inst.* 48.

In the case of a *felo de se*, it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided, 3 *Bac.* 272. This is the only case I have ever discovered, in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a *drag-net* indeed. It may, perhaps, most correctly be considered as a case *sui generis*, and neither

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

At the trial the defendants took three bills of exceptions.

for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases.

Those who are curious on this subject, will be amused with the argument of Chief Justice Dyer, on the drowning of Sir J. Hales, and will, probably, be as much convinced by the reasoning of the Chief Justice, as by the logic of the grave-digger in *Hamlet*, to prove that the drowning of *Ophelia* was *se defendendo*. *Plow.* 262.

Outlawry subjects the party to forfeitures, which are well known to depend upon the nature of the suit on which they are prosecuted. Without inquiring when an office is necessary, or may be dispensed with by the crown, I shall mention one case, where, even after an outlawry, (of which purchasers might always have notice, as it is a matter of record) a fair purchaser was protected, even against the crown. It is from *Hardress*, 101, *The Attorney-General* v. *Freeman*. A. was outlawed, and afterwards made a lease of his lands, and afterwards, these lands, among others, were found by inquisition; and this case was pleaded in bar, to bind the king before the inquisition. The court held that a lease, or other estate made by the party *after* outlawry, and *before* an inquisition taken, will prevent the king's title, if it be made *bona fide*, and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made *after* the inquisition, will take away or discharge the king's title, *5 Bac.* 564. *Salk.* 395. *Carth.* 442.

These cases are strong to show the general protection afforded by law to fair purchasers, even where the forfeiture is *in rem*, and the offender is not actually divested of his possession, the necessity of which is directly affirmed in the second description of cases to which I have referred, viz.

2. *Waived goods.*

"As to waived goods, these belong to the king, and are in him without any office, for the property *is in nobody*. They may belong in like manner to the lord of the manor by *grant*, but not by *prescription*," *5 Bac.* 517. *5 Co.* 109.

The general principle of these cases is conformable to that quoted by Mr. Harper from 12 *Mod.* 92, to show, that an offence like that charged against Brown, divested the property out of *him*, and left it, as it were, in *abeyance* until suit, which vested the property by relation from the act of forfeiture.

A position of greater comprehension, or which, as a general one, should embrace the libellants' case, could scarcely be imagined. Waived goods are in the king *without office*; that is, even *without seizure*, the purpose of which, as to legal title to the king, is answered by the office; the property is, as it were, in *abeyance*; yet this case, so completely applicable in its general principles, contains the strongest possible illustration of the doctrine, that a title by

The 1st presents the following case:

The execution of the policy was admitted. The vessel was of the value insured, and belonged to the plaintiffs,

forfeiture, in the case of a personal chattel, begins from *suit, seizure*, or *conviction*; and has no *relation back*; for "the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; *for the lord's property begins* from the seizure," 5 *Bac.* 517. *Kitchen*, 82.

This case is conclusive against Mr. Hollingsworth's argument, that this question is a question of property only, since it proves that property only begins from the *seizure*, which cannot be lawfully made to affect an intermediately vested right of a third person.

3. The relation of executions at common law, and since the statute—considering this case as one between the government and the claimant, from analogy to cases of the King's precedency in execution.

By the statute of 33 *H.* 8, *c.* 9. it is enacted, that if any suit be commenced or taken—or any process awarded for the recovery of *any* of the King's debts, then the same suit, or process, shall be preferred before any person or persons.

And as to the King's execution of goods, the same relates to the time of awarding thereof, which is the *teste* of the writ; as it was in the case of a common person at common law. 2. *Bac.* 734.

Now to apply this doctrine to the case before the court, and even admitting to this libel the same extent of relation as is admitted at common law upon the King's execution against personal chattels, and as to real and personal by the above recited statute, will it overreach the sale to Captain Norman?

It is generally agreed that an execution, *executed* though *posterior* to the time to which the King's extent relates, bars the King's priority—and in the case of *Lechmere v. Thorowgood*, 3 *Mod.* 236. *Comb.* 123, it was holden that if the King's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the King shall be postponed—*for the property of the goods is changed by the subject's execution.*

Here then we advance one step farther in restricting the doctrine of relation, as it applies to individual interests. It is presumed that the principles of relation upon executions since the statute, are too familiar to require any reference to adjudged cases.

The case of *Roberts & Withered*, as reported by *Salkeld*, and copied by *Bacon*, is in these words: "By the act of navigation, 12 *Car.* 2, *cap.* 18, certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the King, another to him or them that will *inform, seize*, or *sue* for the same."

MA. IN. CO. OF ALEXANDRIA. v. J. AND J. H. TUCKER.

(the defendants in error) who were British subjects, resident at Alexandria. The vessel was navigated under a British register, and had sailed from Alexandria for

It was adjudged that in this case the subject may bring *detinue* for such goods; as the lord may have *replevin* for the goods of his villain distrained; *for the bringing of the action vests a property in the plaintiff*. When this case was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court, than any which occurred in their researches. On a careful examination of that case, I now think it will be found, not to bear on the point now to be decided.

In the first case it may be observed, that the case as reported does not afford any ground to presume that any other person than he who unlawfully imported the goods was interested in that suit; but on the contrary it is presumable that it was a suit against the *original importer*. In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation. And further it is to be remarked, that the question in that case seems to have been only upon the *form* of action. It was *detinue* which is founded *on property*; and all that that case decides is, that in a case of *specific* forfeiture, the bringing of a suit vests a property in the plaintiff sufficient to sustain that *form of action*; for the case to which it is likened, and on which the decision rests, is express to show it does not relate to the *interests of others*; for says the book, "in this case the subject may bring detinue for such goods—*as the lord may have replevin for the goods of his villain*," which case, as I will show, goes not only to the form of action, but to the full length of this case. I will read that case. [Vide *Littleton, section* 177, with *Lord Coke's* comment thereon.] So in this case the ship was liable to forfeiture and might have been specifically recovered from *Brown* by the government, or any prosecutor under its laws, before a *bona fide* alienation by him; but if they have waited until such alienation by him; and a third person has honestly bought and paid for the property, they may be answered in the language of *Littleton*, (" that it shall be adjudged their folly that they did not enter when the offender was in possession;" for according to *Lord Coke*, before such seizure they had neither *jus in re*, nor *jus ad rem*, but *only a right to sue*, which I understood to be *Lord Coke's possibility* above referred to. From all these cases and principles I infer that the relation of the forfeiture to the time of the offence, in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in cases of forfeiture of chattels, the relation is only to *the time of conviction*—that the forfeiture to which a party is subjected, by statute, of a personal chattel, must be construed with relation to *the continuance of his ownership* in that chattel at the time of conviction; and cannot be prosecuted *in rem* to affect a *bona fide* purchaser for a valuable consideration; and this construction I think not only warranted by the statute on which this suit is founded, and which speaks of a recovery of the value of the ship, but also by sound legal principles. The value can only be recovered against the actual offender, and never from a *bona fide* holder; for against the offender it is the value

Kingston, in June, 1801, with a cargo, consigned to Bryan, & Co. in Jamaica, who were instructed, by a letter from the plaintiffs, to sell the vessel and remit the

at the time of the offence; even against a *mala fide* holder it is only of *the thing*, be the value of that thing *greater or less*. If any holder *bona fide* was liable because of his possession, he would not be the less so after he had parted with his possession; but he might be made answerable for the value of the thing in the same manner as if the possession continue with him; but even where he was not strictly a *bona fide* holder, the remedy is lost if his possession is gone. And it is but just, when two remedies are given to punish an offence, one of which shows a plain intent of the legislature, that it shall follow the offender personally, or in his personal interests, so to construe the other remedies as not to permit them to be extended to involve others who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown, by his false-swearing, subjected the ship to forfeiture *de facto*, and that no alienation by him could vest a better title in the vendee than the vendor possessed; and that as he held the ship subject to forfeiture, so any holder under him, or through him, must take subject to that forfeiture, is certainly a strong one.

The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true as a *general* principle; and the exceptions to its operation are those on which I rely to warrant my construction of the statute in providing for a recovery of *the value* of the ship, as well as to show that in some instances he who has no title at all may yet transfer a valid one to personal chattels.

Robbery can give no title to goods, and upon conviction, there is a judgment of restitution, according to the statute, which fixes the remedy against any person in possession *at the time of the conviction*; and this is by the express provision of positive law. Yet the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft, *before conviction*. And if the owner of goods loses them by a fraud, and not a *felony*, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person—e. g. a pawnbroker, who has fairly acquired a new right of property in them.

If, therefore, he who hath no title at all, may in some cases, nevertheless, give a legal right; *a fortiori* he who holds by a title defeasible only within a limited time, (for by the statute of limitation, the prosecution, in cases like the present, must be within three years) may transfer a good title to a *fair* purchaser for a *valuable consideration*.

The language of Blackstone is very emphatic: "the right of proprietors of personal chattels is preserved from being divested, only so far as is consistent with that other necessary policy, that

MA. IN. CO. OF ALEXANDRIA. v. J. AND J. H. TUCKER.

proceeds. The vessel was commanded, ostensibly, by Boaz Bell, but really, by Eli R. Patton, who also went as supercago, with orders to sell the vessel at any rate;

purchasers *bona fide*, in a fair, open, and regular manner, should not be, afterwards, put to difficulties by reason of the previous knavery of the seller."

The statute provides, that in case of a wilful false oath in any of the matters required, previous to the obtaining of the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which, the same shall have been made, or the value thereof to be recovered," &c.

It seems to me, to be the plain and just construction of this statute, that the wilful false swearing does not *ex directo* produce a forfeiture of the ship. The forfeiture is alternative, either of the *ship*, or the *value* of the ship, at the election of the government or persons suing; but not of *both* the ship *and* the value.

If the government had recovered the *value* from Brown, there would have been an end of proceeding against the ship. And if the offence charged against Brown, only produces a specific forfeiture by a *subsequent* election, the argument is cogent, that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity; and conclusive, that Brown's title was not forfeited *de facto*, but forfeitable only, and, therefore, within the principles of the cases of villainage, and waived goods, before relied on by me, and expressly by *Blackstone*, 2 *Com.* 421.

Further, the forfeiture is of the ship or *the value*. I have construed this clause somewhat differently from all the counsel, and though this circumstance produces doubts of its correctness, yet as it has weight with me, and minds of less comprehension may sometimes embrace truths, which may escape superior understandings, I think it my duty to mention it. It is this. That the ship is not liable to forfeiture in the hands of any holder, other than the persons false-swearing, in any case but where such holder would be liable to a suit for the value.

The words, that there shall be a forfeiture of the ship, &c. or of the value thereof, to be recovered, with the costs of suit, of the person by whom such oath or affirmation shall have been made, plainly show the intent of the legislature, that the penalty and punishment should attach to the offender *only*. "To be recovered of the person," both grammatically and legally relate to the *object* to be recovered, to wit, the ship, or the value thereof; and to the *person from whom*, and from whom *only*, the one or the other is to be recovered.

The guilt of false-swearing forfeits only such interests as the offender possessed; for by the express provision of the 16th section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture; and the words of the statute which

but if not sold, to return to Alexandria, with the proceeds of the outward cargo. Bryan, & Co. used their best endeavours to sell the vessel, but without effect, and

connect the recovery with the forfeiture in this case, exclude the idea of any recovery from an innocent holder. *Expressio unius est exclusio alterius.*

If the ship is forfeited by the sole act of the false-swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers in public market. Every particular sale would be a particular conversion, and every one through whose hands she may have passed, might be sued for *the value of the price;* but the statute says, that the value shall *only* be recovered of the offender himself. A party having fairly obtained and fairly lost, or departed with his possession, would not, in such case, be liable for the thing or its value. 3 *Com. Dig.* 359. 2 *T. R.* 750. If not liable when his possession has honestly ceased, neither can he be made so when it honestly continues, since his own act cannot vary his responsibility.

Does reason or policy require a different construction?

The government prohibits an act under a penalty against the party offending. They say, We, for this, forfeit the thing in respect to which you have sworn falsely, if it continues in existence, and is yours; but if lost, or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated, if sold, pay the value; if you have fraudulently impaired the thing, pay the value. The one or the other shall be recovered of you, of *you* the guilty party. But this prohibition contains no threat of punishment against an innocent holder.

No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender; and the law can never require of a purchaser to examine into the secrets of the heart.

It is more the interest and policy of government to increase its wealth and strength by the employment of its ships in trade and commerce, than to augment its revenues by forfeitures. It therefore wisely protects the interests of *fair* ship-holders from forfeiture for the crimes of others, while it carefully provides for the punishment of fraudulent contraventions of its laws. Protection is not, by this construction, afforded to guilt or fraud; it is only a shield for innocence.

The remedy remains, as it ought, *against him who committed the offence.* Government cannot be deprived of its forfeiture by any fraudulent alienation. Such a sale would be void. *Skinner,* 357, *Jones* v. *Ashhurst.* 3 *Co. Twine's case.* 2 *Bl. Com.* 421.

The possession is legally, and to effectuate the statutory provision, still in the vendor. Indeed, all the reasoning on this sub-

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

could get no offer for her, either before or after she sailed from Kingston. Having taken in ten tierces of coffee, the property of the plaintiffs, to be delivered at Alexandria, she cleared out at the custom-house, in Kingston, on the 10th of August, 1801, for the port of Alexandria, with intention to sail, on that day, with convoy then lying at Port Royal, but which convoy did not sail until the 17th.

While waiting for convoy, freight was offered to Baltimore, and the master, having obtained a permit, and made a port entry, discharged his ballast, and took on board twenty hogsheads and ten tierces of sugar, for that port, and signed bills of lading accordingly; but this caused no delay as to the time of his sailing, as he waited for convoy; it being known that several Spanish cruisers were hovering on the coast of Jamaica. On the 17th she sailed for Baltimore, with intention to go first to Baltimore, and from thence to Alexandria. On the 22d, whilst sailing, in the usual course, from Kingston to Baltimore, and Alexandria, she was captured, by a Spanish vessel, as prize, and all her men were taken out by the Spaniards, excepting Bell and one other. In less than three days she was recaptured by a British sloop of war, and carried back to Kingston on the 26th of August, where she was libelled for salvage.

ject is contained in two axioms of the civil law, to which this court may be allowed to refer. *In rem actione tenetur qui dolo desiit possidere. Zouch, Elem.* 197. *Et aliquando, quod fieri non debet, factum valet; firmum et probum quod sit bona fide, improbatur autem quod sit mala fide vel dolo. Zouch, Elem.* 41.

If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interests of commerce, and the security of all ship-holders.

I do therefore *order and decree*, that the libel in this case filed shall stand dismissed, and that the ship, &c. be restored to the claimant.

But as the case involved questions of great difficulty, upon which eminent counsel have differed in opinion, and judges may differ, and it was proper, in every view of the case, to put those questions in a course of legal adjudication, I shall certify probable cause of seizure, and decree restitution, without costs.

The rate of salvage, in cases of recapture, is fixed by British statutes, and does not exceed one-eighth of the value, at the port of adjudication.

Bryan, and Co. as agents of Patton, put in a claim *in behalf of the underwriters*; alleging that the vessel had been abandoned to them.

The vice-admiralty court decreed restoration, on payment of one-eighth for salvage, and full costs; and directed the vessel to be sold, to ascertain the true value, unless it could be otherwise agreed upon.

The claimant used no endeavours to agree with the captors, as to the true value of the vessel and cargo, otherwise than by a sale; and, on the 1st of October, she was sold for 915 dollars, and the ten tierces of coffee were purchased by Patton, for the plaintiffs, at the price of 1,000 dollars. The costs, charges, and commissions, amounted to 909 dollars, and the salvage to 239 dollars. The agents of the plaintiffs were content, and satisfied with the mode of ascertaining the value by sale, and did not apply for an appointment of appraisers to ascertain the value.

On the 24th of September, 1801, when the abandonment of the vessel was made, by Bell and Patton, she was safe in the harbour of Kingston, but liable for salvage; and the value of the ten tierces of coffee, was sufficient to pay the salvage, and all costs and charges.

The register was lost by the capture and recapture, and has never been found. The plaintiffs could not, according to the laws of Great Britain, obtain a new British register, while they continued to reside out of the British dominions.

Baltimore is not in the direct course from Kingston to Alexandria, after a vessel has entered the Chesapeake Bay.

The plaintiffs received information of the capture, and recapture, at the same time, in a letter from Bryan, & Co. dated 25th of September, 1801, which also mentions the sale; but it did not appear at what time the

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

plaintiffs received that letter. On the 26th of November, they offered to abandon the vessel to the underwriters, who refused the offer. Upon this state of facts, the defendants moved the court, to instruct the jury, not to find a verdict for a total, but, at most, for a partial loss, which instruction the court refused to give, and the defendants took their bill of exceptions.

The second bill of exceptions, did not vary the material facts above stated, but alleged that the vessel sailed from Kingston, with an intention of going to Alexandria, but, also, with an intention of touching first at Baltimore, and there delivering part of her cargo, and from thence to Alexandria. That while prosecuting her voyage, with that intent, and while in the direct course, both to Baltimore and Alexandria, and before she arrived at the dividing point, between Baltimore and Alexandria, she was captured, &c. Whereupon, the plaintiffs prayed the court to instruct the jury, that there was no deviation at the time of the capture, and that the voyage insured, was actually commenced; which instruction the court gave as prayed, and the defendants took their second bill of exceptions.

The third exception was, to the refusal of the court to instruct the jury, that the loss of the register, by means of the capture, and recapture, was not sufficient, in law, to defeat the voyage; but that the loss of that document, might be supplied by special documents of public officers, setting forth the circumstances of the loss, so that the vessel might have prosecuted that voyage, without seizure and confiscation, under the laws of Great Britain, for want of a British register.

E. J. Lee, for the plaintiffs in error.

1. The voyage insured was never commenced; and the vessel was not in the prosecution of that voyage, at the time of her capture.

2. The plaintiffs cannot recover for a total loss. If there was, in fact, a total loss, it was caused by the misconduct, or neglect, of the plaintiffs, or their agents, in not doing *the best in their power*, for all concerned.

3. The plaintiffs had not a right to abandon at the time when they offered to abandon.

4. The loss of the register was not equivalent to the loss of the vessel.

5. The not communicating to the underwriters, the intention of going to, or touching at, Baltimore, was such a concealment as vacated the policy.

1st. Was there an inception of the voyage insured?

The contract of insurance is founded on good faith, and must express the intention of the contracting parties. The object of a policy is, to reduce to certainty, and to preserve unaltered, what each party engages to perform. The voyage insured, must be truly and accurately described, as to the time and place at which the risk is to commence, the place of departure, and the place, or *places*, of destination.

Every circumstance relating to the voyage must be stated with the greatest regard to truth. When, therefore, it is intended that the vessel shall *touch* at an intermediate port, or ports, it must be stated in the policy. *Marshall on Insurance*, 227.

This minuteness of description must have for its object the protection of underwriters, from those frauds to which they are exposed, by their unfavourable situation for obtaining correct information. But this object will be defeated, if the insured are not bound to commence and prosecute the voyage described in the policy.

The voyage insured was *from Kingston to Alexandria.* The vessel was bound to sail *directly* to Alexandria, as her *only port* of *destination*, with all convenient dispatch, in the regular and usual course from the one place to the other. If she sailed with a determination to go first to Baltimore, and there deliver a cargo of 30 hogsheads of sugar, and afterwards to come from Baltimore to Alexandria, she did not com-

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

mence, and was not lost in the prosecution of the voyage described in the policy. If the voyage commenced was not *in every respect the same* with that insured, the underwriters are not liable.

The voyage commenced was not a voyage from Kingston to Alexandria, but a voyage from Kingston to Baltimore, and from Baltimore to Alexandria.

It is an uncontroverted principle of marine law, that if the voyage is *changed*, or *not performed in the manner described in the policy*, the policy does not attach. This principle is established by the case of *Wooldridge* v. *Boydell*, *Doug.* 16.

This is not a case of *deviation*, but of *non-inception*. In cases of deviation the *termini* are the same. But it is immaterial whether the termination of the voyage *commenced* is the same with that *insured*, when the vessel, in fact and in truth, sails *directly* for a port not mentioned in the policy, nor contemplated by the parties at the time the insurance was made. If the vessel in this case had commenced a voyage for Baltimore, but with an intention to *touch* at Alexandria, in her way to Baltimore, it would not have been the voyage insured. So if the captain was under an engagement, when he sailed from Jamaica, to go to Baltimore *at all events*, before he came to Alexandria.

The *termination* of the voyage commenced was *Baltimore and Alexandria*. The vessel was obliged to come to *both places*. The *termini* of the voyage were not those described in the policy.

The necessity of *commencing and performing* the *precise* voyage described in the policy, is further proved by the opinion given in the case of *Beatson* v. *Haworth*, 6 *T. R.* 531, where it is decided, that if a vessel is insured to several ports, she must pursue the *order* in which the places are named in the policy.

In the case of *Way* v. *Modigliani*, 2 *T. R.* 30, the question was, whether the policy ever attached; and, if it did, whether it was not discharged by the vessel's

not sailing upon the *precise* voyage insured. The case was this: a ship was insured "at and from the 20th of October, 1786, from any ports in Newfoundland to Falmouth, or her ports of discharge in the channel." On the 1st of October the ship left Newfoundland, and went to the *Banks*, fished there until the 7th, and then sailed from the *Banks* to England; and on the 30th of November, while in the direct track from Newfoundland to England, she was lost. She left Newfoundland for the Banks long before the policy attached, and although on the 20th of October she was in the direct course from Newfoundland to England, and so continued until she was lost, yet because she sailed from Newfoundland with an intention of going to the Banks, and from thence to England, and actually carried that intention partially into effect, it was determined that the policy did not attach, and that the voyage insured was not commenced. The partial execution of the intent cannot vary the principle, and was not relied upon in that case.

BULLER, J. said, "The first is the substantial ground, namely, *that the policy never attached at all.* Where a policy is made in such terms as the present, to insure a vessel from one port to another, she must have sailed *on the voyage insured*, and not on any other. The voyage insured is from a port in *Newfoundland to England*, whereas the vessel sailed *to the Banks*, which was a different voyage. This point has been already decided by the case of *Wooldridge* v. *Boydell*, where it was held, that if a ship, insured for one voyage, sail upon another, *although in the same track part of the way, and she be taken before the dividing point between the two voyages*, the policy is discharged. That was a stronger case than the present, for there the very *intention* of sailing upon a voyage different from that insured, vacated the policy."

The actual sailing to a port is only one mode of proving the sailing with an intention of going to that port. If the intention is proved, it is not material by what means. *Marshall*, 406, (note.) If the voyage is changed, the policy is vacated.

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

A voyage may be changed by taking on board a consignment to a different port; and the consignment will be evidence of the change. Or it may be *changed* by varying the plan of the adventure before the commencement of the risk; but a *deviation* takes place in the execution of the *original* plan. Therefore, an *intention* to alter the voyage will destroy the contract. *Millar*, 431.

To vary in the smallest particular from the original plan of the voyage, constitutes *an alteration*. *Millar*, 392.

In the present case the plan of the voyage was fixed by the policy, and on the 10th of August the vessel had actually cleared out with an intent to pursue it; after which, she discharged her ballast, and took in 30 hogsheads of sugar, to be delivered in Baltimore. This not only altered the original plan of the voyage, but increased the risk of capture, by increasing the value of the prize.

The case of *Stot* v. *Vaughan*, *cited in Marshall*, 232, 4 *Williams' cases*, 296, determined by *Lord Kenyon*, is in favour of the underwriters upon this point.

The case of *Kewley* v. *Ryan*, 2 *H. Bl.* 343, is the only one which has the appearance of opposition. But that case will be found to be unlike the present, in the following particulars:

1. In *Kewley & Ryan* the vessel sailed from Grenada *for Liverpool*, which was the voyage insured, but with an intention to *touch* at Cork, which was in the usual course from Grenada to Liverpool. But, in the present case, the vessel sailed *for Baltimore*, with an intention to come round to Alexandria from Baltimore, which is not in the course from Kingston to Alexandria.

2. In *Kewley* v. *Ryan* the vessel intended only to *touch* at Cork; but, in the case at bar, the vessel sailed on a trading voyage for Baltimore. *Stitt* v. *Wardell*, 2 *Esp. Rep.* 610.

3. The *Eliza* altered the plan of the original adventure, by taking in sugar for Baltimore; but in *Kewley* v. *Ryan* it does not appear that the original plan was changed.

4. The risk was increased by taking the cargo for Baltimore, but the intention of touching at Cork did not increase the risk.

Independent of these differences between the two cases, it is very questionable whether the determination in *Kewley* v. *Ryan* is correct upon principle. It establishes a doctrine which enables the insured to defraud underwriters, by making the evidence of intention to vary the voyage, depend upon the single testimony of the master, which is apt to bend to the interest of his employers. It too often happens, that insurance cases depend upon the same kind of testimony.

The case of *Kewley* v. *Ryan* is also in principle contradicted by that of *Middlewood* v. *Blakes*, 7 *T. R.* 162. *Marshall*, 406, *note* (*b.*)

2d. The 2d point is, that if the plaintiffs are entitled to recover any thing, they can recover only for a partial loss; for if an actual total loss has happened, it has arisen from the negligence and misconduct of the plaintiffs, or their agents, in not doing *the best in their power* for all concerned.

The consideration of this question will involve that of the right of the plaintiffs to abandon at the time they offered to abandon; which is the 3d point in the cause.

In many instances the practice of abandoning has been extended too far. The insured should in no case be permitted to abandon, where the effects insured, or the *greater part of them*, still exist and are *in the power* of the insured.

The general rule is, that the insured may abandon in all cases where, by means of any of the perils insured against, the voyage is *totally lost*, or *not worth pursuing*, or where the thing insured *is so damaged* as to be of

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

little or no value to the owner, or where the salvage *is very high*, or where what is saved is of *less* value than the freight, or where further expense is necessary, and the insurer will not undertake, at all events, to pay that expense.

These principles are declared in the following cases: 2 *Bur.* 683, *Goss* v. *Withers*. 2 *Bur.* 1198, *Hamilton* v. *Mendez*. 7 *T. R.* 421, *Aguilar* v. *Rodgers*. 1 *Dall. Rep.* 11, *Story* v. *Strettell*. *Park.* 165. 4 *Williams' cases*, 373, 376.

The capture or arrest of a vessel, or any detention, is *prima facie* a *total loss*, and *immediately* upon the capture, or at any time while the capture continues, the insured may abandon, and give notice, and thereby entitle himself to claim as for a total loss. But this must be done *while the insured knows of the continuance of the capture, and not after he has information of the recovery or safety of the vessel.* *M'Master* v. *Shoolbred*, 1 *Esp. Rep.* 237. *Marshall*, 494, 501.

On the other hand, the recapture does not necessarily deprive the insured of the right to abandon. For, if in consequence of the capture, the voyage is *lost*, or not *worth pursuing*, if the salvage be *very high*, or if further expense be necessary, and the insurer will not undertake to pay that expense, the insured may abandon. Therefore the rule is, that if the thing insured be recovered before any loss is *paid*, the insured is entitled to claim as for a total or partial loss, according to the situation of the case at the *time when he makes his claim.* For there is no vested right to a total loss until the insured *elects* to abandon.

There are two cases which will be cited for the defendants in error. *Pringle* v. *Hartley*, 3 *Atk.* 195, and *Goss* v. *Withers*, 2 *Bur.* 683, neither of which is like the present.

In the case of *Pringle* v. *Hartley*, the salvage amounted to a moiety of the value of the vessel insured; and there was no person present to give security or answer for that moiety.

The case of *Goss* v. *Withers* was an insurance on the ship and goods. One fourth of the goods were thrown overboard to preserve the vessel and the residue of the cargo. After this the vessel was captured by the French. The master, mate and all the sailors, *except an apprentice boy and a landsman*, were taken out and sent to France. The ship remained eight days in the hands of the French, and was retaken by a British privateer, and on the 18th of January was carried into port for adjudication. Immediate notice was given and an offer to abandon.

But before her capture, the ship, in a storm, was separated from her convoy, and disabled for proceeding on her voyage, without going into port to refit. The residue of her cargo was spoiled while she was refitting, after the offer to abandon, and before she could be refitted. The salvage was a *moiety*; the master and mariners were prisoners; the charter-party dissolved; the freight, except for the goods saved, was lost; and the voyage was not worth pursuing.

But the situation of the Eliza was very different. She sailed from Jamaica on the 17th of August, was captured on the 22d, recaptured in less than three days, and on the 26th was brought into *Kingston*, the very port from which she had sailed only nine days before, and where the agents of the insured were. The salvage was only *one eighth*, and the coffee on board, belonging to the plaintiffs, would have been more than sufficient in value to pay the whole salvage, and all the charges and costs, which did not exceed 909 dollars, even when attended with the costs of the libel, sale and commissions.

If they had rated the vessel at 3,800 dollars, the sum insured, yet the salvage would have been only 475 dollars.

The point decided in *Goss and Withers* was, that a title to restitution cannot take away a *vested right to abandon*, if *the vessel be unfit to perform the voyage.*

There is nothing in the record which shows that, at the time of the recapture, the Eliza was unfit to perform the voyage.

The abandonment of a vessel is an *extreme remedy*, which the insured has in his power, but which he ought

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

not to be permitted to use, when he has *another remedy* which will completely indemnify him for the injury he has *actually sustained.*

This case, we contend, ought to be decided upon the principles which governed that of *Hamilton* v. *Mendez*, 2 *Bur.* 1198. There the ship was captured on the 6th of May, by a French privateer, and all her hands, excepting two, were taken out. On the 23d she was recaptured by a British ship of war, and sent into a British port, where she arrived on the 6th of June. As soon as the insured heard of the capture, he wrote and offered to abandon to the underwriters. They refused to receive the abandonment, but offered to pay the salvage, and all the losses and charges which the insured had sustained by the capture. The question was, whether, on the 26th June, the insured had a right to abandon and recover as for a total loss. The court decided, that he had no right to abandon, and that he could recover as for a partial loss only. The principle of that case is, that if the voyage be only temporarily interrupted, the property, upon the recapture, returns to the owner pledged to the recaptor for the amount of salvage. This doctrine is also stated in the case of *Mills* v. *Fletcher*, *Doug.* 219, and *Thellusson* v. *Fletcher*, 1 *Esp. Rep.* 73.

The actual loss which the insured sustained, was not a total loss, until rendered so by their own negligence or misconduct, or that of their agents. It only amounted to 909 dollars, including salvage. Even if the vessel had been valued at the price insured, viz. 3,800 dollars, the salvage (which by *Stat.* 33 *Geo.* 3, *c.* 66, cannot exceed one eighth) would have amounted only to 475 dollars, which added to the other expenses, would not have exceeded 1,000 dollars.

This sum ought to have been paid by the agents of the insured, who had in their possession funds of their principal, out of which it might have been paid. But it does not appear that they made any effort, or offer to pay it, or to prevent the sale; or any proposition to ascertain the value of the vessel, otherwise than by a sale. They did not do the best in their power for all concerned, but calmly stood by and saw the vessel sacrificed, when they had the power of preventing it.

The insured, therefore, cannot, by abandonment, turn a partial into a total loss. *Esp. Rep.* 73.

It appears upon the record that the insured were anxious to sell the vessel, and this may account for the want of exertion on the part of their agents to prevent a sale, which would charge the underwriters with the full value of 3,800 dollars.

4th. The loss of the register was not equivalent to the loss of the vessel, and was not an event against which the insurance was made.

But the loss of the register might have been supplied by another document, such as a consular certificate, stating the circumstances attending the loss, which would have enabled the vessel to perform the voyage insured, 1 *Rob.* 184, *The Betty Cathcart.* 8 *T. R.* 198, *Christie v. Secretan.* The want of a register would not have occasioned a forfeiture of the vessel, but would only have subjected her to the inconvenience of being considered and treated as a foreign bottom.

5th. The not communicating to the underwriters the intention of going to Baltimore vacated the policy, as the risk was thereby increased. *Marsh.* 347. 3 *Bur.* 1909, *Carter v. Boehm.* 1 *W. Bl.* 594, *S. C. Millar,* 450.

Simms & Swann, contra. Contended, 1. That the voyage commenced was the voyage insured. 2. That the insured had a right to abandon and recover as for a total loss.

1. A policy of insurance, like every other written agreement, is to be construed according to the intention of the parties. The understanding in this case was that the underwriters should take all the risk of a voyage from Jamaica to Alexandria; and consequently they took the risk of the voyage from Jamaica to the Chesapeake Bay, through which a vessel must pass to arrive at Alexandria.

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

We admit the intention to deviate after entering the Chesapeake, but we insist that the voyage and risk insured had commenced; and that the vessel was in the actual prosecution of that voyage when the loss happened. In such a case, although there was an intention to deviate, the insured had a right to abandon. *Park*, 314. *Str.* 1249, *Foster* v. *Wilmer*. *Burns on Insurance*, 107. 2 *H. Bl.* 343, *Kewley* v. *Ryan*. 2 *New-York Term Rep.* 274, *Henshaw* v. *Marine Insurance Company*.

In the case of *Wooldridge* v. *Boydell*, *there was no intention* of going at all to the place mentioned in the policy.

The only point in the case of *Stitt* v. *Wardell*, 2 *Esp. Rep.* 610, is the difference between *touching* and *trading* at a port. In that case there was an *actual trading*, but here was only an *intention* to trade.

In *Beatson* v. *Haworth*, 6 *T. R.* 531, the decision was merely that if the voyage described be to B and C, the vessel deviates by going to C first, and afterwards to B, although C be the nearest port.

In *Way* v. *Modigliani*, 2 *T. R.* 30, the real ground of the opinion of the court is, an *actual deviation* by the vessel having sailed for and stopped to fish on the *Banks*, instead of sailing directly from Newfoundland to England.

The opinion of *Roccus*, cited in a note to *Marshall*, 406, is contradicted by that of *Emerigon*, also cited in the same note—and the latter seems to be the better opinion.

If the alteration of the voyage takes place before the risk is commenced, it becomes a different voyage; but if after, then it is only a deviation. *Millar*, 117.

In the present case, the risk commenced *at* Jamaica, and before the alteration of the voyage was contemplated.

It was to terminate at Alexandria. When the *terminus a quo*, and the *terminus ad quem*, are the same, the voyage is the same.

2. The loss itself, was, in fact, total, and unless the insured have been in fault, they ought to recover for a total loss.

The loss of the register alone was sufficient to defeat the whole voyage, and if the vessel had sailed without it, and had been lost, the underwriters would have been discharged by that very fact of the vessel sailing without proper documents. It would so increase the risk of loss by seizure and condemnation, as to vacate the policy. If she had been found sailing without a register, she would have been considered by the British laws as an alien vessel, and if found trading from a British colony, would have been liable to condemnation.—*Reeve on Ship.* 46, 379, 429. *Bryan & Co.* were not the general agents of the defendants in error. Their authority ceased when the vessel was dispatched and had sailed from Jamaica for Alexandria. They were not authorised to sacrifice the property of the insured in their hands, if they had any, to raise money to pay the salvage and expenses. It is true, the master had an implied authority to do what was fit and proper for the benefit of all concerned; but he was not authorised to send out the vessel without a register, and she could never get a new one unless her owners (the insured) should change their domicil. No document could supply the place of that which itself never could have been obtained, and to which the party was not entitled.

The exception is to the refusal of the court to give the instruction prayed. This instruction would have been improper for two reasons.

1. It would have been conclusive of the whole cause, and no such instruction can be given, unless all the evidence is stated, and unless the bill of exceptions avers it to be the whole evidence. This bill of exceptions does not contain the whole evidence, nor such an averment.

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

2. The instruction prayed involves the decision of a fact, which the jury only were competent to find, viz. whether the damage amounted to more than half the value of the thing insured. *Mills* v. *Fletcher*, *Doug.* 230. This fact is not stated in the bill of exceptions, nor any other fact from which the court can infer it. It contains no evidence that the master had funds to pay the salvage and charges.

The evidence shows the loss to be actually total. The information of the capture, recapture, libel for salvage, and sale to a stranger, all came to the insured at the same time; and there is no evidence of fraud or collusion. The only allegation is, that the master did not do every thing in his power to prevent a total loss. But this allegation is unsupported by evidence. Even if, by a sacrifice of the cargo, he had raised money enough to pay the salvage, expenses, costs, charges and repairs, he must have obtained a new crew, and then could not have sailed without a register.

The voyage was completely destroyed; and, upon an abandonment, which the insured had a right to make, relief would have been refused to the underwriters, even in equity. 3 *Atk.* 195, *Pringle* v. *Hartley*. *Marshall*, 485.

C. Lee, in reply. There are two bills of exceptions to the opinion of the court.

1st. To the instruction given in favour of the plaintiff below, that there was no deviation from the voyage insured, and that the voyage insured was actually commenced.

2d. To the refusal of the court to instruct the jury, that if the facts stated in that bill of exceptions, should be proved to their satisfaction, they ought not to find a verdict for a total, but at most for a partial loss.

1. The voyage insured was a direct voyage from Kingston in Jamaica, to Alexandria in Virginia. But the voyage commenced was a voyage from Kingston to Baltimore, and from thence to Alexandria. Baltimore

not being in the direct course from Kingston to Alexandria, the voyage commenced was not a direct voyage from Kingston to Alexandria, and, therefore, was not the voyage insured. There can be no necessity of referring to authorities to show that, in a policy, a voyage from one place to another, always means a direct voyage in the usual course; because, upon this principle is founded the whole doctrine of *deviation*. But the cases of *Beatson* v. *Haworth*, 6 *T. R.* 531. *Delaney* v. *Stoddert*, 1 *T. R.* 22, and *Middlewood* v. *Blakes*, 7 *T. R.* 162, show with what strictness it has been maintained.

If the direct voyage was not commenced, the commencement of an indirect, circuitous voyage, will avail nothing. The voyage insured was not commenced, *Doug.* 16, *Wooldridge* v. *Boydell*. 2 *T. R.* 30, *Way* v. *Modigliani*. Even if the risk is diminished by the circuitous course, it is not a justification of the voyage, and will not support the policy. *Millar*, 377, 382.

The case of *Kewley* v. *Ryan*, 2 *H. Bl.* 343, is relied upon by the defendants in error. But the law of that case is doubted by *Marshall*, 232, who refers to the case of *Stott* v. *Vaughan*, decided in the king's bench, in 1794, and is opposed to the case of *Wooldridge* v. *Boydell*.

Kewley v. *Ryan* differs essentially from the present case. The intention in the former was only to *touch* at Cork, in the way to Liverpool. Whether Cork is not usually touched at in such voyages, does not appear; but no cargo was on board to be delivered at Cork. The only port of delivery was Liverpool.

In the present case, a considerable cargo was received on freight, deliverable at Baltimore. The intention, therefore, was not merely to touch, but to trade at Baltimore. It was one of the principal objects of the voyage. To *touch* at a port, differs essentially from delivering a cargo, and trading at a port. 2 *N. T. Term Rep. Williams* v. *Smith*, refers to *Stitt* v. *Wardell*, decided by *Lord Kenyon*, in 1797, *Marshall*, 187. After clearing for Alexandria, to receive a cargo fo.

MA. IN. CO. OF ALEXANDRIA. v. AND J. H. TUCKER.

Baltimore, to be delivered there for trade, and to sail with intention to go to Baltimore first, was a complete alteration of the voyage insured.

The opinion in *Kewley* v. *Ryan*, if understood rightly, does not decide this case against the underwriters. The court says, "where the *termini* of the intended voyage are really the same as those described in the policy, it is to be considered as the same voyage."

The word *termini* does not mean merely the *beginning* and *end* of a thing, but *all the limits*; and, in regard to a voyage, it means also the intermediate ports of delivery for any part of the cargo.

In the present case the policy expresses but one port of delivery, the voyage commenced was to two; one of which was out of the course to that mentioned in the policy.

The case of *Way* v. *Modigliani*, was not decided on the ground of deviation, but expressly on the ground of non-inception. Upon this point, the opinion of *Buller*, J. is full.

Wooldridge v. *Boydell* was not decided on the fact, that there was no intention of sailing to the port mentioned in the policy, but upon the fact that the vessel had actually sailed for a different port.

The weight of the case of *Kewley* v. *Ryan*, therefore, is diminished.

1. Because it stands contradicted.

2, It differs essentially from the case before the court, and is not decisive.

3. It may be reconciled with the doctrine advanced in this case by the plaintiffs in error, and, if so understood, is in their favour.

4. If understood as the defendants in error contend it ought to be, it is not law.

2. The 2d bill of exceptions states a case, which would justify the instruction prayed by the defendants below.

Bryan & Co. were the agents and correspondents of the owners—*Patton* also was an agent—having gone out in the vessel as supercargo, and the owners are answerable for their negligence.

On the 24th of September, *Bell*, the master, and *Patton*, the supercargo, by their protest, abandoned the vessel and cargo to the underwriters, when both were safe in the harbour of Kingston, liable only to a small salvage, and to some expenses; and, when the coffee belonging to the defendants in error, and then on board, was more than sufficient to pay all the demands against the vessel. There was no necessity of selling the vessel. Her value might have been ascertained in some other mode. Upon application to the court of admiralty, appraisers would have been appointed. But the agents neither attempted to agree with the recaptors for the amount of the salvage, nor applied to the court to appoint appraisers, but suffered the expenses to be increased unnecessarily, by the admiralty process, and by the commissions on the sale.

The agents of the owners ought to have done as much to increase the amount saved, as if no insurance had been made. It was their duty to do the best for all concerned. If they did not, and if by their negligence the loss has been converted from a partial to a total loss, the underwriters ought not to suffer. Their contract was a contract of indemnity against unavoidable loss, and the insured were bound to use the same care and diligence which a prudent man would use in securing his own property.

As to the loss of the register, it would not have been a cause of condemnation. The law cited from *Reeves* applies only to a vessel which never had a register, and

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

not to one whose register has been destroyed by accident.

March 4.

MARSHALL, Ch. J. did not sit in the trial of this cause.

The other judges, except CHASE, J. whose ill health prevented his attendance, gave their opinions *seriatim*.

JOHNSON, J. Upon the trial of this cause, in the court below, two grounds of defence were assumed by the plaintiffs in error.

1. That the policy had been avoided by a deviation from the voyage insured.

2. That if the insured were entitled to recover at all, it could only be for an average, not a total loss.

In the argument before this court, the first ground was varied, and the plaintiffs in error contended, "that the risk insured was never entered upon."

Without considering the propriety of entering upon the discussion of a question so materially different from that made in the bill of exception, I will only remark "that it was judicious in the counsel to abandon an opinion as inconsistent with natural reason, as it is with the established doctrine of the law of insurance. An intent to do an act, can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance until she reaches the point of divergency, and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British courts from the case of *Foster & Wilmer* to the present time.

The doctrine now insisted on by the plaintiffs in error, was probably suggested by some incorrect expressions attributed to Lord Mansfield in the case of *Wooldridge*

& Boyde'l. It is said that the Judge in that case expressed an opinion, that "if a ship be insured from A to B, and before her departure the insured determine that she shall call at C, which is out of the usual course of the voyage from A to B, this is rather a different voyage than an intended deviation." This opinion was certainly in no wise material to the decision of that case, and is expressly contradicted by the case of *Kewley & Ryan*, and a case, which I consider with much respect, decided in the State of New-York, between *Henshaw* and *the Marine Insurance Company of New-York.* We can only vindicate the accuracy of his Lordship's opinion in the case which he states by supposing, that his mind was intent upon those cases of intended deviation, in which a *suppressio veri*, or necessary increase of risk, are the grounds of decision.

The ordinary rule for ascertaining the identity of a voyage insured, is by adverting to the *termini.* A rule which is certainly correct as far at it extends, but in the rigid application of which, it is easy to conceive that cases may occur in which it would bear injuriously upon the insurer. If it has any defect, it is in not extending far enough the claim to indemnity, as the *terminus ad quem* may in many instances be relinquished without any possible increase of risk, or even without varying the risk, except only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown, in Maryland.

Whether the risk insured against in this case, ever was incurred, I would test by the question, whether, if the *Eliza* had arrived in safety, or even had sailed for Europe, the insured might have legally demanded a return of the premium? I presume not. The insurance being at and from the port of Kingston, the risk commenced during her stay in port, and cannot be apportioned when thus blended, but was wholly and indefeasibly vested in the underwriters, although the ves-

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

sel had forfeited her policy by shaping her course for Europe the moment she had left the port of Kingston. In the case before us, she adhered to her ultimate destination, and the forfeiture of her insurance could not have been incurred until after entering the Chesapeake and actually bearing away farther eastward than was consistent with her course to the Potowmack.

2. With regard to the question, whether it be a case of total or average loss, a very few observations will suffice to satisfy the mind that the judgment below is correct.

If, under every combination of circumstances, the insured is bound to procure money at whatever interest, or to raise it at whatever sacrifice of property, to defray the disbursements for repairs, reshipping a crew, salvage, costs of suit, and every incidental expense, this will be shifting the loss from the insurer to the insured. Should it be admitted, that in the case before us, the insured were under any greater obligation to ransom and refit the vessel than the insurer, the circumstances in evidence are sufficient to excuse him. Unsuccessful attempts had been made to dispose of both vessel and cargo, and as to raising money on bottomry, who would have accepted the security of a vessel embarrassed by the loss of her register, to a degree, the extent of which could not possibly be foreseen; a bond for money to become due on the arrival of a vessel which perhaps might never be able to sail, or if she did sail without her necessary documents, would be exposed to innumerable hazards, and among them, the forfeiture of her insurance for that very cause.

It is true, that a case of capture and recapture, where the two events are communicated, before an election to abandon has been actually communicated to the underwriters, will not, of itself, sanction an abandonment.—Yet, it is equally true, that in case of capture, a recapture alone will not deprive the party of his right to abandon. The consequences of the capture and recapture, the effect produced upon the fate of the voyage, must govern the right of the parties. This effect is always a matter of evidence, and must rest much upon

the discretion of a jury. This doctrine is well illustrated in the cases of *Pringle & Hartley*, and *Goss & Withers*.

In the case before us, the information of the capture, recapture, and sale, was communicated in the same letter. The loss was then certainly total, and as the insurers cannot charge the insured with any premeditated design to involve the vessel in the difficulties which broke up the voyage, I think they ought to bear the loss.

Much has been said about the liability of the insured for the misconduct of his agents, but as all amounts to a charge that they did not make use of forced means to raise money for the release of the vessel, an obligation not incumbent upon them, it does not appear to me that the extent of the liability of the insured for the acts of the captain or supercargo, after the death-stroke is given to the voyage, need be considered.

WASHINGTON, J. There are but two questions in this cause, which I deem worthy of particular consideration; for the last exception is, to the refusal of the court to give an opinion upon a matter of fact, and for which no foundation was laid by the evidence spread upon the record, even if it had been proper for the court, in such a case, to give an answer to the question propounded. I, also, lay out of the case, the award mentioned in the declaration, not only because no breach is assigned which applies to it, but because no opinion was asked of, or given by, the court respecting it.

The first subject which claims attention is, whether, upon the facts stated in the second bill of exceptions, the court below was right in the direction given to the jury, that there was no deviation, at the time of capture, from the voyage insured, and that the voyage insured was actually commenced. The facts, material to the decision of this point, are, that the Eliza cleared out at Kingston, for Alexandria, and a bill of lading was signed by the master, to deliver her cargo at Alexandria. That after her

Ma. In. Co. of Alexandria v. J. and J. H. Tucker.

clearances were obtained, she took in a cargo for Baltimore, and bills of lading were signed for delivering the same at that port. That the captain sailed from Kingston, with an intention, previously formed, of proceeding first to Baltimore, and there landing part of her cargo, and then to go to Alexandria, but she was captured before her arrival at the dividing point, between Baltimore and Alexandria.

It is admitted, that this is not a case of deviation, because the intention formed at Kingston, before the voyage commenced, of going first to Baltimore, was never carried into execution. The only question then is, whether the voyage described in the policy was changed or not? As to this, there is no difference of opinion at the bar, respecting the legal effect of an alteration of the voyage, on the contract of indemnity; it is, and must be conceded, that the policy never attached. But the difficulty is in determining what circumstances do, in point of law, constitute such an alteration as will avoid the policy.

The criticisms of the counsel for the plaintiffs in error, upon the rule contended for by the defendants, ought not, in my opinion, to avail them, if that rule be firmly established by uniform decisions: for in questions which respect the rights of property, it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason.

The first case we meet with, upon this subject, is that of *Carter* v. *The Royal Exchange Assurance Company*, which is cited in *Foster* v. *Wilmer*, decided in the 19 *Geo.* 2. The former was an insurance on a ship from Honduras to London, and the latter on a ship from Carolina to Lisbon, and at and from thence to Bristol. In both, a cargo was taken in to be delivered at an intermediate port; but the loss having happened before the ship had arrived at the dividing point, the insurers were held liable, upon the ground that nothing more was intended than a deviation, which, not being carried into execution, did not avoid the policy.

The case of *Wooldridge* v. *Boydell*, is next in point of time. This was an insurance on a ship, at and from Maryland to Cadiz. She cleared for Falmouth, and a bond was given to land the whole cargo in Britain. No evidence was given that the vessel was bound to Cadiz; she was taken before she came to the dividing point. At the trial of this cause, *Lord Mansfield* told the jury, that if they thought the voyage intended, was to *Cadiz*, they were to find for the assured; but if there was no design to go to that port, then they were to find for the defendant, and the ground upon which the court decided the motion for a new trial was, that there *never was an intention to go to Cadiz*. But it is plain, that if Cadiz had been intended as the ultimate port of destination, the clearing out for an intermediate port, with an intention to land the cargo there, would not have been considered as any thing more than an intended deviation.

Way and Modigliani was decided in 1787, and was an insurance at and from the 20th October, 1786, from Newfoundland to Falmouth, with liberty to touch at Ireland. She sailed on the 1st of October, from Newfoundland, went to the Banks and fished till the 7th, and then sailed for England, and was lost on the 20th. The reasons assigned for the decision of this case, give it the appearance of an authority unfavourable to the doctrine laid down in the above cases. But the weight of it is greatly diminished, if it be not destroyed, by the following considerations: 1st. That as there was a clear *deviation*, it was unnecessary to decide the other point that the policy did not attach; and, 2d. That this latter opinion seems to have been entertained only by one of the court, and even this judge seems to have relied very much upon the fact, that the vessel *sailed to the Banks*. 3d. From what is said in *Kewley & Ryan*, it would appear that the ship, when she left Newfoundland, did not sail for England, and of course the voyage insured never was commenced.

Kewley & Ryan, decided in 1794, was a policy on goods from Genoa to Liverpool. The ship sailed on that voyage, but it was intended, as plainly appeared by the clearances, to touch at Cork. She was lost, however, before she arrived at the dividing point; and the decision conformed to those given in the preceding cases, the

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

termini of the intended voyage being really the same as those described in the policy.

The case of *Stott & Vaughan*, decided at *Nisi Prius*, in 1794, before *Lord Kenyon*, seems opposed to the principles laid down in the preceding cases, and, if we have an accurate report of it, is inconsistent with the decisions of the same judge, in *Kewley and Ryan*, and other cases.

Murdoch and Potts, decided in 1795, was, in principle, as strong a case of a change of voyage, as that of *Wooldridge and Boydell*, but equally contributes to explain the general doctrine laid down in all the cases. For in this, the *terminus ad quem* was, most obviously, *St. Domingo*, where the freight insured was payable, or some port, other than Norfolk, where the ship was to call for the sole purpose of receiving orders.

The last English case which I shall notice, is that of *Middlewood and Blakes*, decided in 1797. It was an insurance on the *Arethusa*, at and from *London* to *Jamaica*, for which place she cleared out; but the captain was bound by orders, to call at *Cape St. Nicola Mole*, in order *to land stores there*, pursuant to a charter-party. She was captured after she had passed the dividing point of three several courses to Jamaica, but before she had reached the subdividing point of the continuing course to Jamaica and that leading to the Mole. The whole court considered this as a case of deviation only, and Lawrence J. was so strongly impressed with the weight of former decisions, that, not attending to this obvious objection to the plaintiff's recovery, but considering the *termini* of the voyage intended to be the same with those mentioned in the policy, his first opinion inclined to the side of the plaintiff.

The case of *Henshaw and The Marine Insurance Company*, decided in the supreme court of *New-York*, confirms the principles of the above cases, and would command my respect were it opposed to them.

The rule, then, which I consider to be firmly established, by a long and uniform course of decisions, is, that if the ship sail from the port mentioned in the policy, with an intention to go to the port, or ports, also described

therein, a determination to call at an intermediate port, either with a view *to land a cargo*, for orders, or the like, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation, if the intention be carried into execution, or be persisted in after the vessel has arrived at the dividing point.

The next question is, whether the court below, erred in refusing to instruct the jury, that if they believed the facts stated in the first bill of exceptions, they were to find an average and not a total loss? The defendants in error, contend, that by the capture and recapture of the vessel, under the various circumstances of loss of crew, inability to pay the salvage and expenses, loss of register, &c. the voyage insured was completely defeated, and, therefore, the assured had a right to abandon and demand as for a total loss.

On the other side it is insisted, that the captain might, in a variety of ways, have prevented the sale of the vessel, and that if he had done the best in his power for the interests of all concerned, he might have liberated the vessel from the *lien* of the captors, and have performed his voyage in safety to Alexandria, without any other inconvenience than this temporary interruption, and the payment of salvage and expenses. If so, that it was not competent to the assured, under these circumstances, to convert a loss partial in its nature into a total one.

Whether the assured had a right to abandon, and recover as for a total loss, or not, was a question of law, dependent upon the point of fact, whether, upon the whole of the evidence, the voyage was broken up, and not worth pursuing; and in the consideration of this question, the jury would, of course, have inquired, amongst other matters, whether the captain had done what was best for the benefit of all concerned. The court might, with propriety, have stated the law arising upon this fact, which ever way the jury might find it, and indeed such would have been their duty, if a request to that effect had been made. But the court very correctly refused to give the direction as prayed, because, by doing so, they would have decided the important matter of fact, upon which the law was to arise, which was only proper for the determination of the jury. In the case of *Mills*

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

and Fletcher, which turned upon the question, whether the captain, by his conduct, had not made the loss a total one, *Lord Mansfield* would not decide whether the loss was total or not, but informed the jury, that they were to find as for a total loss, if they were satisfied that the captain had done what was best for the benefit of all concerned.

Upon the whole, then, I am of opinion, that the judgment ought to be affirmed.

PATERSON, J. This action was brought on a policy of insurance, which John and James H. Tucker, being British subjects, residents at Alexandria, had effected on the body of the sloop Eliza, her tackle, apparel, and furniture, to the value of 3,800 dollars, at and from Kingston, in the island of Jamaica, to Alexandria, in the state of Virginia. The policy bears date the 1st of September, 1801.

The first question to be considered is, whether the voyage, on which the sloop Eliza set out, was the same or a different voyage from the one insured? By the terms of the policy, it is stipulated, that the Eliza was to sail from Kingston to Alexandria; and it is stated in the bill of exceptions, that she did sail from Kingston, but with an intention to go first to Baltimore, and there deliver 20 hogsheads and 10 tierces of sugar, and then to proceed to Alexandria, which was the port of destination described in the policy. She cleared out at the custom-house in Kingston, on the 10th of August, 1801, for Alexandria, and the master signed a bill of lading to deliver her cargo at that place; after which he took in the sugar, to be delivered at Baltimore. It is contended on the part of the insurers, that the taking in the sugar, to be landed at Baltimore, constituted a different voyage from the one agreed upon, and vitiates the policy; or in other words, that the voyage which was the subject of the contract, was never commenced. From a review of the cases, which have been cited, the principle is established, that where the *termini* of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage. In the present case the *termini*, or beginning and ending points of the in-

tended voyage, were precisely the same as those specified in the policy, to wit, from Kingston to Alexandria, and, in legal estimation, form one and the same voyage, notwithstanding the meditated deviation. The first reported case on this subject is *Foster* v. *Wilmer*, in 2 *Str.* 1249; in which *Lee*, C. J. held, that taking in salt to be delivered at Falmouth, a port not mentioned in the policy, before the vessel went to Bristol, to which place she was insured, was only an intention to deviate, and not a different voyage. And the chief justice, in delivering his opinion, mentioned the case of *Carter* v. *The Royal Exchange Assurance Company*, where the insurance was from Honduras to London, and a consignment to Amsterdam; a loss happened before she came to the dividing point between the two voyages, for which the insurer was held liable. The adjudication in *Strange* was in the 19 *Geo.* 2, and from that time down to the year 1794, we find no variation in the doctrine. A remarkable uniformity runs through the current of authorities on this subject. In *Kewley* v. *Ryan*, 2 *H. Bl.* 343, *Trinity term*, 1794, the principle is recognised; and in 2 *New-York Term Rep.* 274, *Henshaw* v. *The Marine Insurance Company*, *February*, 1805, it is fortified and considered as settled by the supreme court of that state. In a lapse of sixty years we find no alteration in the doctrine, which is sanctioned, and has become too deeply rooted and venerable by time, usage, and repeated adjudications, to be shaken and overturned at the present day. It has grown up into a clear, known, and certain rule, for the regulation of commercial negotiations, and is incorporated into the law merchant of the land. Where is the inconvenience, injustice, or danger of the rule? It operates in favour of the insurers, by a diminution of the risk, and not of the insured, who have the departure in contemplation; for if the vessel, after she has arrived at the point of separation, should deviate from the usual and direct road to her port of destination, the insurers would be entitled to the premium, and exonerated from responsibility. An intention to deviate, if it be not carried into effect, will not avoid the policy. There must be an actual deviation. The policy being "*at and from*," the risk *commenced*; there was also an actual inception of the voyage described; for the Eliza sailed from Kingston for Alexandria, was captured in a

MA. IN. CO. OF ALEXANDRIA. v. J. AND J. H. TUCKER.

direct course to the latter, before she reached the dividing point; and, therefore, the underwriters became liable for the loss.

The second point in the cause is, whether the insurers were liable for a total or a partial loss? And here a preliminary question presents itself. Was the abandonment made in proper time? When the Tuckers received information of the loss, it became incumbent on them to elect, whether they would abandon or not; and if they intended to abandon, it was incumbent on them to give notice of such intention to the underwriters. Our law has fixed no precise period, within which the abandonment shall be made, and notice of it shall be given to the insurers; but declares, that it shall be done within a reasonable time. In the case before us it appears, that John and James H. Tucker received information of the capture and recapture of the Eliza at the *same time*, in a letter from *W. and B. Bryan and Co.* dated on the 26th September, 1801; but it does not appear *when* the letter came to hand. On the 26th of November, 1801, the Tuckers offered to abandon the Eliza to the insurers, which offer was rejected. Can it, under these circumstances, be pretended, that the Tuckers were guilty of neglect, or that the abandonment was not made according to the settled rule? It was made within a reasonable time, and no neglect can justly be imputed to them. We must have some facts, whereon to build the charge of negligence, for it is not to be presumed; and the intervening period between the date of the letter and the time of abandonment, after making a due allowance for the passage of the letter, does not afford sufficient ground, on which to raise the imputation of neglect. This brings us to the great question in the cause, whether the insurers were liable for a total or an average loss. On the 22d August, 1801, the Eliza was captured by a Spanish armed schooner, in the usual course from Kingston to Baltimore and Alexandria, and a day or two afterwards was recaptured by a British sloop of war, and carried into Kingston on the 26th of the same month. The mere acts of capturing and recapturing are not of themselves sufficient to ascertain the nature and amount of the loss sustained. The loss may be total, though there is a recapture. *Hamilton* v. *Mendez*, 2 *Bur.* 1198. *Aguilar and others* v. *Rodgers*, 7 *D. & E.* 421. Whether the loss be partial or total, will depend upon the par-

ticular circumstances of the case, which it becomes necessary to take into view. The Eliza was consigned to *Bryan & Co.* at Kingston, who were authorised to dispose of her; they endeavoured to sell her, but without effect; and it is stated, that they could get no offer for her before she sailed from Kingston, nor since that time. *Bryan & Co.* put on board 10 tierces of coffee, of the value of 1,000 dollars, belonging to the Tuckers, to be delivered at Alexandria; and when she was captured, all the seamen, except Bell, the ostensible master, and one man, were taken on board the Spanish schooner. The Eliza was navigated under a British register during the voyage; which register was lost by reason of the capture and recapture, and has never been found. After the recapture, the Eliza and her cargo were libelled in the vice-admiralty court for salvage; a claim was put in by *Bryan & Co.* as agents for *Eli Richards Patton*, the real and navigating master and supercargo; and the sloop and cargo were adjudged to be lawful reception on the high seas, and ordered to be restored, on paying to the recaptors one full eighth part of the value of the sloop and cargo for salvage, with full costs; and to ascertain the value it was further ordered, that the sloop and cargo should be forthwith sold by the claimants, unless the value should be otherwise agreed upon. The sloop was insured for 3,800 dollars, and sold for 915 dollars; the coffee sold for 1,000 dollars; and the costs, charges, and commissions, amounted to 909 dollars, which almost absorbed the sum for which the sloop was sold. It is not found, that the sloop had sustained no damage by the capture and recapture; and, considering the difference between 3,800 dollars, the value insured, and 909 dollars, the price for which she sold, the jury might, without other evidence, have presumed, that she had received considerable injury. From these facts taken together, the inference is rational and just, that the voyage was broke up and destroyed, and that the underwriters were liable for a total and not for an average loss. To repel this inference, and remove responsibility from the insurers, it has been urged in argument, that the agents for the Tuckers were guilty of gross neglect and misconduct. If *Bryan & Co.* ceased to be agents after the sailing of the sloop, then

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

the captain became clothed with an implied authority to do what was fit and right, and most conducive for the interest and benefit of all the concerned; and, therefore, whether the agency of *Bryan & Co.* continued, or, being at an end, devolved by operation of law on the captain, is perfectly immaterial; for the question still recurs, whether the actual or implied agent had been guilty of fraud, negligence, or other improper conduct, which would exonerate the insurers. I am not able to discern any misconduct on the part of the agent, that would exculpate the underwriters, and prevent their being responsible for a total loss. And indeed, this was a point proper for the decision of the jury, agreeably to the case of *Mills* v. *Fletcher*, in *Doug.* 230; and, therefore, the exception taken to the opinion of the court was not well-founded. The sloop could not be sold at private sale, and, by reason of the capture and recapture, she might have sustained considerable damage. To sell the coffee, which constituted the cargo for Alexandria, to satisfy the salvage and costs, would have been an imprudent measure; for the redemption would have absorbed the whole proceeds, and then she would have returned to Alexandria without a cargo, as the captain had no funds to purchase one; and besides, she must have sailed without a register, which would have exposed her to great and unnecessary danger. Prudence dictated the sale as a safe step, and most for the benefit of the concerned.

The error set forth in the third bill of exceptions is, that the court below refused to instruct the jury, that the loss of the register, by means of the capture and recapture, was not sufficient, in law, to defeat the voyage from Kingston to Alexandria, and might have been supplied by special documents. Though the register did not impart any physical ability to the sloop, in regard to her sailing; yet, it was a document which tended to communicate safety, as it designated her character, individually and nationally. It is a necessary paper, and operates as a national passport; for, without it, she might be seized as an unauthorised rover on the ocean, and in certain cases, would have been liable to confiscation. The register is a docu-

ment of such a special and important nature, that its loss cannot be fully made up by other official papers. It would have been a very imprudent step for the captain to have proceeded on his voyage without a register; if he had, he would have been justly charged with improvidence, negligence, and culpable misconduct.

CUSHING, J. I consider this as clearly a case of intentional, not actual deviation; but not as a case of non-inception of the voyage insured.

This is proved by a number of cases cited; and contradicted by none.

What a case of non-inception is, is shown by the case of *Wooldridge* v. *Boydell*, *Douglass*, 16, where the ship was insured from Maryland to Cadiz, having no intention at all of going there; but that is totally different from the present case, where the vessel was cleared out at Jamaica for Alexandria, with a cargo taken in for Alexandria, and intended to go there.

It is true sugars were taken in for Baltimore, and the captain intended going there first. That amounts only to an intent to deviate; but no deviation unless executed.

This is proved by divers authorities. *Middlewood and Blakes*, 7 *T. R. p.* 162, *B. R.* a ship insured at and from London to Jamaica, and the captain had orders (exactly like the case at the bar) to touch at Cape Nicola Mole, to land stores, pursuant to charter-party. Upon which, one of the judges *(Lawrence)* gave an opinion, that if the vessel had been captured before she came to the dividing point, between the northern and southern courses to Jamaica, the insurers would have been liable.

And the other judges agreeing with judge Lawrence, to lay the whole stress of the cause in favour of the insurer, upon the captain's not exercising his judgment at the time, upon which was the best and safest of the three courses, (whose judgment the insurers had a right to have the benefit of) but taking the northern course, merely in pursuance of orders, to land stores at Cape Nicola Mole. All this shows, that had the captain exer-

MA. IN. CO. OF ALEXANDRIA v. J. AND J. H. TUCKER.

cised his judgment in going the northern course, as being the best and safest, the whole court would have held the insurer liable, as the vessel was captured before she came to the dividing point, between the course to the Cape and to Jamaica.

Another case, more direct and decisive, is *Foster* v. *Wilmer*, 2 *Str.* 1248, 9, where the ship was insured from Carolina to Lisbon and to Bristol, and the captain took in salt to deliver at Falmouth, before going to Bristol, repugnant to the specification of the policy, yet being captured before arriving at the dividing point between Falmouth and Bristol, the insurer was held liable, which seems exactly the present case.

The mere taking in goods for another port, does not, of itself, make a deviation. It may, however, if it materially vary the risk, and be a circumstance designedly concealed and suppressed, excuse the underwriters. In the present case it does not appear, materially, to vary the risk, any more than in taking in stores to land at Cape Nicola Mole, in the case of *Middlewood and Blakes*, varied the risk, which was not suggested by court or counsel, that it did; or the taking in salt to land at Falmouth, in the case of *Foster and Wilmer*. It did not delay the voyage in the present case; the vessel sailed with convoy as soon as it was ready, and was afterwards captured in the proper course, before deviating.

The award may be laid out of the case, for more reasons than one. I think it void for uncertainty.

As to the loss, whether total or average, the jury, who had the whole evidence before them, have, in effect, found a total loss, and the voyage broken up. It is not certified by the court, that the bill of exceptions contains the whole evidence; and as strong circumstances (I think conclusive ones) are stated, that show the voyage could not be safely pursued, or could not be pursued at all, in consequence of the loss of register and loss of hands by the capture, either of which, it does not appear, could be supplied, I think we are not warranted to overrule the verdict, or reverse the judgment.

Judgment affirmed.

THE UNITED STATES v. HETH.

THE UNITED STATES. v. HETH.

The collector of the district of Petersburg was *not*, by the act of the 10th of May, 1800, restricted to a commission of two and a half per cent on the monies by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States.

THIS was a case certified from the circuit court of the fifth circuit, holden in the district of Virginia, where a question arose upon which the opinions of the judges were opposed.

The question was, whether the defendant, as collector of the customs for the district of Petersburgh, was restricted to a commission of two and a half per cent on any, or all of the monies collected and received by him after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods, wares, and merchandise, imported into the United States.

This question arose upon the 2d section of the act of congress, entitled "an act, supplementary to an act, entitled an act, to establish the compensation of the officers employed in the collection of the duties on import and tonnage"—passed on the 10th of May, 1800, *vol. 5. p.* 173. The words of which are, "that in lieu of the commissions heretofore allowed by law, there shall, from and after the thirtieth day of June next, be allowed to the collectors for the districts of Alexandria, Petersburgh, and Richmond, respectively, two and a half *per centum* on all monies which shall be collected and received by them," "for and on account of the duties arising on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships and vessels."

Breckinridge, attorney general, in behalf of the United States, observed, that the words of the act appeared to him so plain that they could not be elucidated by argument. He understood the language of the act to be, that only two and a half per cent should be allowed on monies received after the 30th of June. Although the collector may have done the greater part of his duty by taking bonds for the duties, yet they were neither collected nor paid before that day. It cannot be deemed an unconstitutional act as being *ex post facto*, because the prohibition of the constitution extends to criminal cases only. 3 *Dal.* 386. *Calder v. Bull.*

THE UNITED STATES v. HETH.

Col. Heth. Although it is a sound rule of construction, that when the words of a statute have a plain, distinct, and reasonable meaning, no recurrence is to be had to *intendment*, *inference*, or *implication*, yet, when the words of a statute admit of *two* constructions, (as in the present case they evidently do, or they would not now be under discussion) it cannot be improper to have reference to similar laws, and to inquire how *they* have been construed.

The first section of the act of 14*th Feb.* 1795, *vol.* 3, *c.* 88, says, "that in lieu of the commissions heretofore by law established, there shall be allowed to the collectors of the duties on import and tonnage, on all monies by them respectively received on account of the duties aforesaid, arising on tonnage, and on goods, wares, and merchandise, imported after the last day of March next, to wit," "to the collector of Bermuda, Hundred," (which office was then holden by the defendant) "*two per cent.*" This act raised his commission from one to two per cent; which two per cent he charged only on the duties that arose on *importations* made *after* the last day of March, 1795; and one per cent only on the money received on bonds, payable after that day for goods imported before.

The act of 3*d March*, 1797, *vol.* 3, *ch.* 63, raised the defendant's commissions from two to three *per cent*, in precisely the same language as that of the last act; and of course, it received from him the same construction, and in both instances that construction was aequiesced in by the treasury department.

The next act upon the subject, and that which next precedes the act in question, is that of 2*d March*, 1799, *vol.* 4, *ch.* 129, *p.* 447, entitled "an act to *establish*" (a word not used in the titles of the former acts) "the compensations of the officers," &c. the second section of which runs thus: "that from and after the last day of March next, and in lieu of the fees and emoluments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers, and surveyors, the fees following: that is to say," &c. &c. (to the collectors of sundry ports, not including the defendant)

"and to the collectors of all other districts, three per cent on all monies by them respectively received on account of the duties arising on goods, &c. imported into the United States, and on the tonnage of ships and vessels," whereby the defendant's commissions were *established* at *three per cent.*

A difference of phraseology will be observed between this and the two former laws. This section says, "*that from and after the last day of March next*," certain commissions shall be "allowed and paid" on all monies received on account of duties arising on goods "*imported into the United States*," and not, as before, "*imported after* the last *day of March next.*" Yet this difference of phraseology made no difference at the treasury in the construction of this law, until very lately.

The next act is that upon which the present question arises; the second section of which says, "that in lieu of the commissions heretofore allowed by law, there shall, *from and after the 30th day of June next*, be allowed to the collectors, &c. two and a half per centum, on all monies which shall be collected and received by them, for and on account of the duties arising on goods, wares, and merchandise *imported into the United States, and on the* TONNAGE *of ships and vessels.*"

There is no difference between the words of this act, and those of the act of 1799, excepting that the present act uses the words "*collected and received*," and the act of 1799, uses the word "*received*" only. But the word "*collected*," is believed to be merely an accidental tautology, which cannot alter the meaning of the section.

Neither of the two last, like the former laws on the same subject, confines, *by express words*, the commissions to the monies received for duties arising on goods imported *after* a certain date; but the word *after*, is placed in a different part of the sentence; yet all these laws received the same construction at the treasury, for at least five months after this last act had passed; a construction, which, as the defendant still contends, was perfectly correct.

THE UNITED STATES v. HETH.

The collector can receive no higher or lower commission upon the monies "collected and received" upon the duties arising on the tonnage of a vessel, than upon the *merchandise imported in such vessel.*

The section of the law in question, confines the change of commissions to the money *arising* on goods *imported after* the 30th of June, and on the tonnage of vessels, as strongly as if the words "after the 30th of June," had immediately followed the word "imported."

The participle, "*arising*," must refer to the time when the section is to take effect, i. e. "from and after the 30th of June next." The duties arise when the goods are landed, and when the bonds are taken.

To what *time* the words "arising" and "imported" relate, is not, perhaps, at first view, very obvious; but the *date* is found in the preceding part of the section.—The only period mentioned throughout is "the 30th day of June."

The true reading of this section must be thus:—"there shall be allowed on all monies to be received for duties arising on goods imported after the 30th of June next." To speak of duties "*arising*" after the 30th of June, 1800, on goods imported and landed before that day, would be absurd; for the duties "arise" as soon as secured, though not *received* till a distant period.—The word "*imported*," stands without any sign of *time*, and may be past, present, or future, with equal propriety, unless resort be had to inference, and to the context. The language, to have been precise, should have been either "which may have been imported," or "to be imported." The word, however, standing without the explanatory signs, must receive that construction which is most consonant to justice, reason, and common sense.

By the 63d section of the collection law of 2d March, 1799, it is enacted, "that the duties imposed by law on the tonnage of any ship or vessel, shall be paid to the collector, *at the time of making entry* of such ship or vessel; and it shall not be lawful to grant any permit, or to

unlade any goods, wares, or merchandise whatever, from such ship or vessel until the said tonnage duty is first paid."

It being admitted by the attorney-general, that the *import* duties and the *tonnage* duties must go hand in hand, no one can be at a loss for the *time* when the duties on the goods imported in any ship or vessel arose. It would be absurd to say, that the defendant was entitled to 3 per cent upon the money received for the duties on the tonnage of the vessel which arrived and entered on the 20th of June, and only two and a half per cent upon the monies which might fall due, and be *collected and received* by him after the 30th of June, for, and on account of the duties which had arisen on the 20th of June, upon the goods imported in the same vessel.

Had it been the intention of congress, to have *raised* the commissions of some collectors, and to have *reduced* those of others, for *like* services performed under a former law, they would have said, "that from and after the 30th day of June next, the commissions hereby allowed, shall be upon all monies by them respectively received, for, and on account of the duties on goods, &c. which may be then due to the United States, and *outstanding upon bonds*, or which shall arise on goods, &c. imported into the United States."

But had such been the language of the law, it would have been unconstitutional, because *ex post facto*, and tending to impair the obligation of the contract, which was made between the United States and the collectors, by the act of 1799. Yet the construction now contended for by the attorney-general, will give the law the same effect, as if its language had been as just stated; for it will take from the collector one-half per cent on the amount of bonds, which were outstanding at his office on the 30th of June, 1800, and which, of course, had been taken under the preceding act of 1799, by which his commission was established at three per cent.

This construction will also involve both *absurdity* and *oppression*.

THE UNITED STATES v. HETH.

Suppose a person, on the 29th of June, 1800, had secured duties, by bonds, to the amount of 500 dollars, payable at eight, ten and twelve months; and that ten other citizens had made entries on the same day, the duties on which, amounted only to 49 dollars each, which being under 50, they were each obliged to pay down, and upon which, the collector immediately received his commission of three per cent; yet, if the late construction of the treasury be correct, the collector was entitled to receive only two and a half per cent upon the bonded duties, although his responsibility and services were much greater than in the other cases, in which he received his three per cent on duties which *arose* at the *same time* on goods imported at the *same time*, and in the *same vessel*, and although the bonds were taken under the *same law* of 1799, which expressly *established* a commission of three per cent, from and after the last day of March, upon all monies received for duties *arising* on goods *imported* into the United States until a new provision should be enacted and go into operation; that is, in effect, until the 30th day of June, 1800; for it never could have been the intention of congress, that *compensation laws* should apply to other cases than such as should *originate after* such laws should go into operation.

Another case will show how the present construction of the treasury might have proved extremely oppressive to the defendant. Suppose that when he rendered his quarterly account to the treasury, up to the 1st of April, 1800, there were then outstanding bonds for duties in his office, to the amount of 150,000 dollars. He had a right to calculate upon receiving, in the course of the year, 4,500 dollars for his commissions thereon, and to make his engagements accordingly. After making such engagements, the law interferes to the utter ruin, perhaps, of the collector, who relied upon the faith of his government. If congress have a right to take away one sixth part of the collector's compensation, for services already rendered, they may take the whole. The laborious and responsible part of those services is performed when the bonds are taken. It consists in receiving the entries of merchandise, examining invoices, classing and estimating duties, and taking bonds with responsible sureties, &c. Indeed, the residue of the services is mere matter

of form in many instances, for the bonds so taken are lodged in the bank where the monies are "collected and received," though the collector acknowledges the receipt of them in his weekly returns. It can never be permitted to the United States, after these services are rendered, to say, we have changed our mind; instead of three per cent you shall have but two and a half per cent. Such a conduct on the part of an individual would be treated with contempt and indignation; or were this a case between a state and one of its citizens, and the state should come into this court for relief, the court would not hesitate to compel the state to perform its contract. The constitution of the United States, art. 1, section 10, says, "no law impairing the obligation of contracts shall be passed."

If the treasury construction prevails, it will, in almost every instance, confine the operation of the act of 1799, to three months, instead of allowing it to operate until the next law took effect; for one third of all the bonds taken in July, 1799, for duties on European goods, and all the bonds taken for duties on wines and teas, did not fall due till July, 1800.

Suppose the law had contained such a clause as this, "that from and after the 30th day of June next, in lieu of the duties heretofore imposed by law, on goods, &c. imported from Europe, subject to a duty of *twelve and a half per cent ad valorem*, there shall be charged only a duty of ten per cent *ad valorem*, upon all such goods, &c. imported into the United States."

Suppose a ship from London had arrived on the 13th day of June, 1800; that all the cargo had been duly entered and discharged before the end of the month, except one consignment of considerable value, and that after the expiration of fifteen working days, such goods had been taken from on board, and stored agreeably to law. Upon the 1st of July, the assignee appeared before the collector, with his entry duly made out, and his sureties ready to enter into bonds for the duties. The collector contended for the duties at *twelve and a half per cent ad valorem*; the consignee offered to secure the duties at *ten per cent ad valorem*. Would this court say that he was not bound to pay the *twelve and a half per cent* duties, because, from

THE UNITED STATES v. HETH.

neglect or design, he did not secure the payment of the duties, and take away his goods when the other importers did?

The difference of phraseology, between the two former and two latter laws, on the same subject, was not the effect of a design to benefit one collector, and to injure another; but was merely owing to the different manner in which different men will ever express themselves, in defining the same subject matter.

Breckenridge, attorney-general, in reply.

No argument, in favour of the defendant, can be drawn from the act of 1795, *vol.* 3, *p.* 168; for the words there, are expressly "on goods, &c. *imported* after the last day of March," but the words of the present act, differ very materially; instead of saying, on goods imported after the 30th of June, it says, on monies *collected and received* after the 30th of June. The difference of phraseology used by the legislature, when legislating on the same subject, evidently implies a difference of intention.

The word "arising" makes no difference in the construction of the sentence. It would have the same meaning if that word were entirely left out. The expression, "*duties on goods*," is the same, in effect, as the expression, "*duties arising on goods.*" That part of the sentence is only descriptive of the subject, or fund, out of which the monies were to be received. The words of the act of 1797, *vol.* 3, *p.* 392, which gave the defendant a commission of three per cent are "on all monies received on account of the duties arising on tonnage, and on goods, wares and merchandise, *imported after* the last day of March, in the present year." Here is the same remarkable difference in language, which was observed in the act of 1795; and which adds strength to the argument, that the variation of the expressions was not accidental, but intended to convey a different signification.

The words of the act of 1800, are not that the collector shall receive only two and a half per cent on the *duties* arising on goods imported after the 30th of June; but on all *monies*, *collected and received*, after that day, on goods imported at any time. *Monies due*, by bond,

are not *monies collected and received.* The actual collection, and receipt of the money, was the only act which could entitle the collector to his commission, under either law; and if collected and received after the 30th of June, only two and a half per cent could be demanded.

JOHNSON, J. This is an amicable suit, instituted to try the question, whether the defendant, lately collector of the port of Petersburgh, was, after the 30th day of June, 1800, entitled to retain three per centum on the amount of sums received by him after that time, upon bonds for duties taken between that period and the last day of March, 1799.

The claim of the defendant is founded upon the act of March 2d, 1799, "to establish the compensations of the officers employed in the collection of the duties," &c. And the opposition, on behalf of the government, is founded on the act of May 10th, 1800, supplementary to the one before mentioned.

The whole difficulty results from the vague signification of some of the expressions made use of in the latter act; which, so far as may be material to the present decision, are contained in the following extract from the 2d section: "That in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th day of June next, be allowed to the collectors for the districts of Alexandria, Petersburgh and Richmond, respectively, two and a half per centum on all monies which shall be collected and received by them," "for and on account of the duties *arising* on goods, wares and merchandise, *imported* into the United States, and on the tonnage of ships and vessels."

On behalf of the United States it is contended, that the rights of the collectors of duties, with regard to their compensation, are absolutely submitted to the will of congress; that congress has uniformly increased or diminished that compensation, as circumstances suggested the expediency of such a measure, without regarding any supposed limitation of their right to do

THE UNITED STATES v. HETH.

so, imposed by the claims of their officers; that it has been the uniform policy of the government to apportion the commission to the actual receipt of money; and, therefore, whatever may have been the proportion of their labour or responsibility, their right to compensation was not consummated before the actual receipt of the duties, and the amount of their commission remained liable to be increased or diminished at the will of congress; that in passing their act of May 10th, 1800, they had a right to give it a retroactive operation; and the latter words of the 2d section, "arising on goods imported," will bear, and ought to receive such a construction.

At the same time that I admit the correctness of the prefatory observations of the attorney-general, my mind is led to adopt a conclusion unfavourable to the construction which he contends for.

The rights of the collectors of duties, as to their compensation, are certainly submitted to the justice and honour of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.

That it is the policy of the United States in granting compensations to her revenue officers, to limit the consummation of their right to the actual receipts of money, is evident from a view of all her acts on that subject. But it is observable, that every end of that policy is answered in this case, because the claim of the defendant is founded upon the actual receipt of money

arising upon bonds taken while the compensation was at three per cent. His claim has no relation to the amount bonded, but to the amount actually received upon the bonds taken prior to the last act.

Upon considering the question, therefore, upon the construction of the act, I confine myself to the single inquiry, how far the government has exercised its power, in reducing the compensation to the defendant, from three to two and a half per cent?

The words of the act, "arising on goods imported," although in themselves very indefinite in point of time, will receive a precise signification in this respect, by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it be necessary that the court should make an election between these words, in order to complete the sense, its choice will be immediately determined by recurring to two well known rules of construction, viz. that it ought to be consistent with the suggestions of natural justice, and that the words should be taken most strongly "*contra proferentem.*"

But there are other considerations, which will lead to a conclusion, without supplying any supposed deficiency in the wording of the sentence. There is nothing, either in the terms made use of, or in the professed object of the law, necessarily retrospective; but the general intention of the act, as well as the signification of the word *arising*, both point to a future operation. Besides which, where it can be shown that a government has once adopted a certain rule of justice for its conduct, it is fair to infer, that in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed; and in the act of March 3d, 1797, which varies the compensation of the revenue officers, in several particulars, that alteration is expressly restricted to take effect only with regard to future importations. I am of opinion, that the defendant shall have judgment.

THE UNITED STATES v. HETH.

WASHINGTON, J. The point submitted by the circuit court of Virginia to this court is, whether the defendant, as collector, was restricted to a commission of two and a half per cent on any, or all of the monies collected and received by him, after the 30th June, 1800, on account of bonds previously taken for duties arising on goods, &c. imported into the United States.

The solution of this question must depend upon another: does the 2d section of the act of the 10th of May, 1800, extend to duties which arose upon goods imported before, and received after, the 30th of June in that year, or is it to be restricted to duties arising on goods which should be imported after that period?

I am strongly inclined to the opinion, that every part of this section is future, and that a literal construction will render it entirely prospective upon the whole subject. The time at which the substitution of two and a half for three per cent is to take place, as well as that of collection and receipt, are certainly future, and there is, I think, as little doubt that those receipts can only apply to duties which should arise after the same period, the word *arising* being clearly future in relation to the time specified in the section. The word *imported*, though past in relation to the duties which were to arise on the goods imported, may, nevertheless, be future in relation to the period when the charge of commissions was to take effect, and I think it ought to be so construed in this case, because the duties arise either immediately upon the importation of the goods, or upon the performance of some acts which, in contemplation of law, are immediately to follow the importation.

This construction is, I think, considerably strengthened by a reference to former laws upon the same subject.

The act of March, 1797, is plain and express upon this point, by fixing the commissions allowed by that law to monies received on goods *imported after the last day of that month*. The 2d section of the act of March, 1799, was obviously intended to increase the commis-

sions of some collectors, and to vary the relative compensations which had been allowed to the several collectors by the former law; but there is no reason to believe that it was intended to change the objects for which this compensation to the collectors generally was to be allowed. Yet this law does not, in express terms, confine the commissions to duties arising on goods imported after the specified day, as had been done in the preceding act, but is worded, in this respect, precisely like the law immediately under consideration.

It is hardly to be imagined, that over and above the increase of commissions allowed by the last law for services after the 31st of March, to be *wholly* rendered, the legislature intended to increase the commissions allowed by the act of 1797, for services which had been in part performed before the 31st of March, 1799, without an expectation of such increase, and where nothing remained to be done but to receive the money. Yet this would be the case, if the increase be not restricted to goods imported after the specified day. The change of expression in the latter law, I take to be perfectly accidental; and, in construing one of them by the other, both being *in pari materia*, I feel myself constrained to read the latter as if it had been expressed thus: "That after the last day of March, 1799, there shall be the following commissions allowed on all monies received by the collectors respectively, on account of duties arising on goods, &c. imported into the United States, *after that day*," &c.

The 2d section of the act of 1795 was clearly intended to diminish the compensation of some, and to increase that of other collectors, and can, with as little reason as in the former case, be construed to change the objects for which this compensation was allowed. Such a construction would have the effect of raising the compensation of some collectors, and depressing that of others, for services partly performed at the same time, and in some instances, where those which remained to be done, in order to consummate the right to the commissions, were transferred from the collectors to the banks. This would, I think, be unrea-

THE UNITED STATES v. HETH.

sonable, and, in the instances of diminished commissions, would be unjust.

That the services performed preparatory to the collection or receipt of the duties, were considered, by the legislature, as equal, at least, to the receiving of the money, is proved by the 4th section of the law of 1799, which provides, that whenever any collector should die, or resign, the commissions to which he would have been entitled on the receipt of all duties by him bonded, shall be equally divided between the collector resigning, or the legal representatives of the deceased collector, and his successor, whose duty it is made to collect the same.

I cannot, therefore, consent to such an interpretation of this law, as to give it a retrospective operation, so as to deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation, and to be in their nature severable, from the ultimate act of the money being received or collected, provided those acts are in reality performed.

My opinion is, that the defendant is entitled to three per cent on all monies collected and received by him, after the 30th June, 1800, on account of bonds previously taken, for duties arising on goods imported into the United States.

PATERSON, J. The basis of this action is, the statute of congress, of the 10th of May, 1800; and the question is, whether the defendant is restricted to a commission of two and a half per cent, on monies collected and received after the 30th of June, 1800, by virtue of revenue bonds, executed previously to that date. The words of the statute are, "that in lieu of the commission, heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors of Alexandria, Petersburgh, and Richmond, respectively, two and a half per cent, on all monies which shall be collected and received by them, for and on account of the duties arising on goods, wares, and merchandise, imported into the United States, and on the

tonnage of ships and vessels." The defendant was late collector of the customs, for the district of Petersburgh, in the state of Virginia. Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. The word "arising" refers to the present time or time to come, but cannot, with any propriety, relate to time past, and embrace former transactions. As to the word "imported," it may comprehend the past or future, or both, according to the subject matter, and the words with which it is associated. Thus the word "arising," coupled with the words "on goods imported," shows, that the whole clause has a future bearing and aspect, and will not justly admit of a retroactive construction. According to this view of the subject, the commission of two and a half per cent, is to be restricted to monies received by the collector of Petersburgh, on account of the duties arising on goods, wares, and merchandise, which shall be imported after the 30th of June, when the act went into operation. To fortify the foregoing construction, it may be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers.

CUSHING, J. The question referred to this court by the circuit court is, whether the defendant, as collector, by the act of the 10th of May, 1800, was restricted to a commission of two and a half per cent, on any or all of the monies collected and received by him, after the 30th June, 1800, on account of bonds previously taken for duties arising on goods, wares, and merchandise, imported into the United States?

There was a prior act of congress entitling the defendant to three per cent, on all monies received on account

THE UNITED STATES v. HETH.

of duties arising on goods imported into the United States, within his district; which act was in full force during the time those duties arose, and until the subsequent act in question of the 10th of May, 1800, was to come into operation, which was the 30th of June following; and the question is upon bonds previously taken for duties arising on goods imported before the 30th of June. Upon this question I am of opinion, that the collector has a right to the three per cent allowed by the former law, on all monies secured by bonds previously taken as aforesaid, for duties arising on goods imported before the 30th of June, 1800; and that he is not restricted by the latter law to two and a half per cent. And that the general and true intent of the latter law was to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to hav a retrospective effect, to divest vested rights of th collector; it being unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose.

Whether the words "from and after the 30th of June," are in the beginning, middle, or end of the sentence, the meaning, in this respect, appears to me the same—to give the collector a new allowance on goods imported after that time.

When the former duties were secured by bond, the laws, I think, consider them, as far as regards the collector's allowance, as collected and received; the principal services being already done by securing the duties by bond.

MARSHALL, C. J. being one of the judges whose opinions were opposed in the court below, did not sit at this hearing.

MANELLA, PUJALS, AND COMPANY v. JAMES BARRY.

ERROR to the circuit court of the United States, for the district of Maryland.

The action was brought by the plaintiffs in error, to recover from the defendant, Barry, the price of three cargoes of tobacco, purchased and shipped by Barry, for account of the plaintiffs, but which were captured on their way to Spain, and condemned. The ground of the claim was, that Barry had not strictly pursued his instructions as to the shipments.

The transcript of the record contained two bills of exceptions.

In the first bill of exceptions, all the material facts of the case were stated, but the exception was taken only to the opinion of the court, who refused to suffer a witness to be sworn *to the jury*, to prove what was the true translation of a certain part of the Spanish instructions, as to which the parties differed, although the plaintiffs and defendant consented that the witness should be so sworn. This opinion, it is understood, was founded upon the idea, that the court, and not the jury, was the proper tribunal to decide the meaning and construction of all written evidence.

The facts stated in the first bill of exceptions, and which were referred to in the second, presented the following case:

On the 27th of January, 1798, Bernardo Lacosta, of Cadiz, in Spain, for and on behalf of the plaintiffs, who were also Spanish subjects, wrote and transmitted to the defendant, by the hands of Juan Alonzo Menendez Conde, a letter in the Spanish language, the following translation of which, purporting to be made by a sworn translator, was read in evidence to the jury.

If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority, from the foreign merchants, thus to controul and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders.

MANELLA, PUJALS & Co. v. J. BARRY.

"Cadiz, 27th January, 1798.

"To Mr. James Barry, Baltimore.

"My most esteemed friend,

"I derive a particular satisfaction in introducing to you the bearer of this letter, Mr. Juan Alonzo Menendez Conde, who goes to Baltimore as agent of the house of Messrs. Manella, Pujals, & Co. of this place, principally interested in the importation of tobacco for this kingdom. The confidence I have always had in you, and the friendship you have on all occasions manifested for me, warrant the conclusion that you will view this measure as your own, and will execute it with your wonted zeal and efficacy. Being an undertaking of considerable magnitude, a proportionable degree of economy should be observed in the purchases, the shipments and the reimbursements, because the least neglect may cause an enormous loss. By the last accounts from America, I find that tobacco has risen to a great price, but I hope this was only momentary. However, upon a reasonable calculation it will not answer them at more than ten dollars per quintal, in America; these are the limits to which they can go without exposing themselves to too much loss. You will, however, consult the bearer, Mr. Menendez, or he with you, and in case you should determine on an advance of one fourth or one half a dollar more, to prevent delay, you may do so if you think proper, being fully convinced if you can do it for less, that you will omit nothing that may advance the interest of my friends. With this, the said Mr. Menendez takes an order for twenty thousand quintals to be shipped for this place in seven or eight vessels, and not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law.

"For the greater perspicuity the shipments will be made in the following manner:

"1. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them to this place, alternately to me, to Messrs. Gahn and Company, and to Messrs. Pablo, Greppi, Marliani and Company.

"2. Your letter, by the vessel, will state that the consignment is made on your account; that you order her to Cadiz, where you hope that the consignees may be able to sell, but that if the government should not permit the sale, or the English prevent her entry, that then the vessel is to proceed to Genoa.

"3. That the captain carry no other letters than those relating to the cargo, but he must have one for Charles Longhy, of Genoa, to whom the consignment will be made, in the supposed case of not being suffered to enter this port, or be permitted to sell here.

"4. Should the captain be prevented entering here, he will put into the nearest Spanish port to this, and send an express to the consignee.

"5. The captain will bring the charter-party, and the letter to cover the shipment; that, as well as the bill of lading, should specify two freights, one for Cadiz, and the other as though the vessel was in fact destined for Genoa.

"6. In the invoice by the vessel, you will insert all the charges except the commission, which is understood shall be five per cent, to be hereafter added.

"7. By the way of England you will transmit the true invoices, adding thereto your commission.

"8. Great care should be taken, in the *role d'equipage*, as to the birth, age, size, &c. of the seamen, and that it agree in date and number with the shipping articles.

"9. Admitting that the vessel cannot enter here, there must not be any excess of freight on her going to another Spanish port; but this condition must be confidential with the captain, and must not appear in any document.

"10. The vessels should have Mediterranean passes, and, in a word, all other necessary documents, that we may have no difficulties with the privateers there; and if you could have the papers examined by the French,

MANELLA, PUJALS & Co. v. J. BARRY.

On the 10th of July, 1798, 100 hogsheads, amounting to 13,876 dollars and 48 cents, by the schooner *Felicity*, an American vessel, regularly documented as such, and navigated by American citizens, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Gahn & Co. at Cadiz.

On the 23d of July, 1798, 117 hogsheads, amounting to 17,269 dollars and 77 cents, by the brig *Susanna*, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Pablo, Greppi, Marliani & Co. at Cadiz.

On the 16th of August, 1798, 288 hogsheads, amounting to 43,064 dollars and 54 cents, by the ship *Henrietta*, an American vessel, regularly documented, and navigated by citizens of the United States, for the account and risk of Don Carlos Longhy, of Genoa, and consigned to Bernardo Lacosta, at Cadiz.

And on the 8th of November, 1798, 191 hogsheads by the brig *Fly*, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

The Moorish brig *Muqueni* was captured by the British, and condemned at Gibraltar, together with her cargo, as enemy's property.

The Danish brig *Minerva* was captured by the French, and, together with her cargo, condemned as good prize, by a French consul at Malaga, in Spain.

The ship *Henrietta* was captured by the British, and, with her cargo, condemned at Halifax as enemy's property.

The other four vessels arrived safe, and their cargoes were received by the plaintiffs, and applied to their own use and profit. The bills drawn by the defendant, to the amount of 204,073 dollars and 72 cents

were duly paid, and the proceeds came to the hands of the defendant, and were applied to the purchases of the tobacco.

The cost and charges of the tobacco which arrived safe, exceeded the sum to which it would have amounted at 10 dollars per quintal, by the sum of 5,478 dollars and 27 cents.

The defendant produced the letters of Menendez, of which the following are translated extracts:

"City Washington, 28th May, 1798.

"Mr. James Barry, Baltimore—Esteemed sir, by your favour of 27th instant, I am informed relative to the purchases of tobacco, and the affreightments entered into for its shipment, all of which you have executed with that zeal and efficacy which you are accustomed to, and I therefore approve of the exactitude of your operations. At same time, I flatter myself that you will continue successively with equal activity, until the total compliance of 20,000 quintals ordered; and you may rest assured as to my particular errand, that the payments shall be realized in London."

"Washington, 29th May, 1798.

"Under date of yesterday I wrote you a letter, approving of all your operations relative to the tobacco purchases, and affreightment for its shipment. The contents thereof I now confirm, you having done every thing to my entire satisfaction, and as I would have expected from your exactitude and zeal. On the score of placing the funds in London, you may rest satisfied, because you well know that this is the principal object which has compelled me to go to Spain. I hope that in the next order we shall be able to effect the purchases to more advantage, and with less trouble."

MANELLA, PUJALS & Co. v. J. BARRY.

"Capes of Virginia, on board the ship Polly and Nancy, 14th June, 1798.

"Dear Friend,

"The 4th instant we sailed from Alexandria, and ever since have we been in the river, detained by calms and contrary winds, which has made me very impatient.

"By the last accounts which I have observed in the newspapers, I am persuaded that war is as much as declared between the United States and France. This novelty troubles me much, for which reason, if it be agreeable to you, and equally convenient, to have the future shipments made on Danish or Swedish flags, and in the name of Charles Longhy, of Genoa, you acting as his agent; you may do it so by declaring in the bills of lading and invoices, that the cargoes are for the account and risk of said Longhy, and by giving letters to the said captains for Messrs. Greppi, Lacosta, or Gahn, of Cadiz, of the following tenor:

'Gentlemen, in virtue of orders I have received from Mr. Charles Longhy, of Genoa, to remit him a cargo of tobacco, on his proper account and risk. I have loaded in the ship ——, captain ——, [so many] hogsheads of tobacco, and I have given orders to said captain to touch at your port, (if not blockaded) and to call upon you with a view to get permission from your government to sell a parcel; should the captain succeed in entering your port, and that you can obtain leave to dispose of the whole or part of his cargo, you will please to do so, for the best advantage of the said Mr. Longhy, remitting him the proceeds to Genoa. And in case that you cannot obtain a sale, you will please to direct the captain to proceed on to the said port of Genoa, supplying him with the means therefor,' &c.

"In this way it will be proper for you to charge your commission in the invoice. I contemplate, that by making the further shipments in this mode, the property will go with more security, said Longhy being a neutral subject; and should the vessel be met by French cruisers,

the cargoes would go secure, as the property would not appear to be American. I also believe that nothing of this would affect the insurances; and at all events it is best, because the insurances will be done on neutral ships and neutral property, so that the property also sounds as neutral. Should you, since my departure from Baltimore, have chartered any American vessel, you can make the shipment in the same way; because, in case a French cruiser should capture the vessel, the cargo may be saved on account of its not appearing to be American property; so that the only thing subject to condemnation, in that case, will be the vessel and her freight; whereas, if the property goes in your name, both vessel and cargo will be condemned, if under American colours; but, if on a Danish or Swedish vessel, then the cargo only would be condemned. Therefore, whenever you can meet a Danish or Swedish vessel, and by making the shipment as for account of Longhy, the neutral subject, there can be no risk. Therefore, it appears to me very proper and consistent, in order to obviate these risks, in every case that the further shipments do not sound in your name, but in that of said Longhy; or if not, in that of Messrs. Gahn & Co. of Cadiz, or of Mr. Gould, your brother-in-law, provided the French and the Portuguese come to a good understanding, which I am informed is the case, and that matters have been accommodated between them.

"Finally, you know, better than I do, the critical circumstances of the day, and for this reason I am satisfied you will be attentive in making choice of the mode which may be best calculated to save any shipment you may make. I can only say that of this vessel, I have much fear and apprehension, notwithstanding she sails fast.

"In case you should act conformably to what I have here mentioned as to further shipments, I, from this moment, approve thereof; and that it may appear, and to save you from any accident that may occur, as also to prove that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order that at no time whatever you should be chargeable with the consequences.

MANELLA, PUJALS & CO. v. J. BARRY.

"You will encharge the captains to wait the opportunity of a fresh N.W. wind, in order the sooner to get clear of the coast, and the danger of cruisers, the same we had in view. You will also direct them to make for the first port of Spain, be it which it may, as the great object is to save the cargoes."

This letter was received by the defendant before the shipment by the Henrietta was made.

On the same 14th of June, 1798, Menendez wrote a letter also to Robert Barry, the nephew, and principal clerk and assistant of the defendant in his business, of which the following are translated extracts:

"By what I wrote your uncle under this same date, you will be informed of all that I have recommended. In addition to which, I shall mention to you, that you will perceive in the copy of the private instructions what I am directed to do on the score of the tobacco shipments, and you will see in one article thereof, that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of the neutral subject. In the present day it may be said, that war is declared between these states and the French republic; for which reason we may view the thing in a different light.

"When you make up the general invoice, you will recollect to charge in that which you are to forward to Bernardo Lacosta, two and a half dollars per quintal of tobacco, over and above the real costs and charges, adding a note to the bottom thereof, that you do not charge insurance, nor loss on the reimbursements, such being to be done in Europe, and that you do not know to what amount they may ascend. The general invoice containing the real costs and charges you will remit to Mr. Joseph Anthony de Sola, administrator general of the king's tobacco stores at Cadiz, or directed in my name, which letter for me will always come to the hands of said Sola. You already know that the other fictitious invoice is intended to be exhibited at Madrid, but that no other person shall know any thing of the other that is to contain the real cost and charges, by which only we the concerned

are to be governed. The invoice you are to remit to Bernardo Lacosta, in which the two and a half dollars per quintal is to be overcharged, is also to be delivered to Joseph Anthony de Sola, which you will remind him of."

This last letter was received by Robert Barry, within a few days after its date, and before the shipment by the Henrietta, and was by him delivered to the defendant.

It was also proved that Menendez, on his first arrival at Baltimore, declared to the defendant, that he had private instructions not contained or specified in the said letter of the 27th of January, 1798; and that those private instructions authorised, among other things, a shipment of the tobacco to be purchased, in neutral vessels generally, without confining the same to American vessels. That Robert Barry saw in the possession of Menendez, soon after his arrival in Baltimore, a written paper in the Spanish language, purporting, and declared by Menendez to be a paper containing such private instructions. That Menendez read a part of them to Robert Barry, who looked at the paper at the same time, and saw that he read correctly, and that what he read was of the purport aforesaid.

That at the time of taking up the Moorish brig and Danish barque, the defendant found it impossible to procure suitable American vessels. That Menendez knew of and approved, the shipments in the Moorish brig and Danish barque at the time they were made. That the defendant constantly communicated with Menendez, during his stay in Baltimore, on the subject of the said purchases and shipments, and therein acted with his entire approbation and concurrence. That Menendez urged the necessity of making the shipments of the tobacco speedily, even if the price should be greater than 10 dollars per quintal, calculating, as he said, that if the tobacco should arrive in Spain at 15 dollars, the concern would clear 100,000 dollars, and that for his share or interest therein, which was one tenth, he should clear 10,000 dollars. That the aggregate of all the purchases of tobacco, excluding insurance, freight, and commis-

MANELLA, PUJALS & Co. v. J. BARRY.

sions, did not exceed ten dollars and a half per quintal, and that Menendez approved the prices at which they were made.

That Danish and Moorish vessels were neutral vessels, and that the tobacco was really shipped for the actual account and risk of the plaintiffs.

Whereupon, says the first bill of exceptions, "the plaintiffs, by their counsel, offered to swear a witness to prove to the jury, that the said paper, at first read, in evidence to the jury by them, as a true translation of the said letter of the 27th of January, 1798, is not a correct translation of the said letter, in that part of it which is contained in the following words, "*para presentiar la expedicion*," and that the true construction of the said words is, "to be present at, or assist in, the shipments," and not "to *superintend* the shipments," as in the said paper is stated; to the swearing which witness, for the purpose aforesaid, the defendant, by his counsel, consented, but the court would not admit such evidence to be given to the jury on the trial of such issue, to determine the true import and legal construction of the said words." To which opinion the counsel for the plaintiffs excepted.

The second bill of exceptions began as follows:— "And upon the aforegoing statement, prefixed to the first bill of exceptions in this case, the plaintiffs, by their counsel, prayed the directions of the court, that if the jury believed the matters so offered and given in evidence by the plaintiffs, then the plaintiffs are entitled to recover, on their action, the amount of the price, costs, and charges of the tobacco, shipped as aforesaid on board" the Moorish brig Muqueni, the Danish brig Minerva, and the American ship Henrietta, and also the sum of 5,478 dollars 27 cents, being the excess in the price, costs, and charges of the four cargoes shipped by the defendant, and received by the plaintiffs as aforesaid, over and above the price limited by the letter of the 27th of January, 1798. "But the court were of opinion, and did direct the jury, that by that letter, the defendant was authorised to make the shipments of tobacco on board of other than American vessels, or

vessels belonging to citizens of the United States, agreeably to the laws thereof, and that the shipment of the tobacco in the Moorish and Danish vessels, as stated in this bill of exceptions, (the said vessels being admitted to be neutral vessels as aforesaid) was not in violation of the instructions in the said letter, and that the plaintiffs have not sustained the present action for the recovery of damages for such shipments on the said Danish and Moorish vessels, against the said defendant. And the court were also of opinion, and did accordingly direct the jury, that by the said letter of instructions, the defendant was authorised to make the shipment of tobacco in the ship Henrietta, as above stated in this bill of exceptions, and to consign the said tobacco for the account and risk of the said Don Carlos Longhy, as stated in the said bill of exceptions.— And the court were also of opinion, and did direct the jury, that if the defendant had not such discretion by the said letter, yet if the jury believe that the said several shipments of tobacco, on board the said Moorish and Danish vessels, and the said American ship Henrietta, were made as herein before stated, by the direction, and with the approbation of the said Menendez, or were afterwards ratified by him as agent of the plaintiffs, as herein before stated, the plaintiffs have not sustained their present action for the recovery of damages for such shipments. And the court were of opinion, and directed the jury, that the evidence was sufficient in law to establish that the said shipments were made by the direction of the said Menendez, as agent of the plaintiffs, and were also ratified and confirmed by him as agent as aforesaid. And the court were also of opinion, and directed the jury, that the price of ten dollars and a half for each quintal of tobacco, limited by the said letter of the 27th of January, 1798, for the purchase of tobacco by the defendant, was the price that the defendant might give in America, exclusive of charges of every kind, and that as the price of the said tobacco, shipped by the defendant, did not average so much as ten and a half dollars per quintal, the plaintiffs have not sustained the present action to recover damages for the excess of price given including charges." To which several opinions the plaintiffs excepted.

MANELLA, PUJALS & Co. v. J. BARRY.

The verdict and judgment were for the defendant, and the plaintiffs brought their writ of error into this court.

Harper, for the plaintiffs in error, observed, that the duty which he was now called upon to perform, was more painful than any which had occurred in the course of his professional practice. He was called upon to urge a claim against an honourable and respectable man, to the amount, perhaps, of his whole fortune. A claim founded upon no charge of dishonourable conduct or intentional injury, but upon an excess of authority in undertaking to judge for the plaintiffs, where the plaintiffs meant to judge for themselves. A loss has happened, and the question is, upon whom shall it fall?—If the defendant has violated his instructions, though with the purest intention, he has taken the responsibility upon himself.

The first point made in the court below, was that the jury, and not the court, was to ascertain the true translation of the Spanish instructions.

The question, what ideas a man meant to convey, is a question of fact to be decided by a jury. But what is their legal effect, is matter of law.

To enable the jury to say what ideas are by the custom or usage of a nation, annexed to certain words or phrases, they must inquire by witnesses.

But this is a question not material to the merits of this case, and admitting, for the sake of argument, that the court was the proper tribunal to translate the instructions, two questions will arise:

1. Whether the defendant has deviated from the strict letter and prohibition of his instructions? and,

2. Whether, if he has, he was justified by any authority contained in the letter of Lacosta, or by the orders and assent of Menendez?

1. He has deviated from the letter of his instructions in shipping the tobacco in Danish and Moorish vessels, which could not be commanded by American captains.

The words of the instructions are, "you will take care to seek captains of fidelity, *American born*, and all the crews be strictly agreeable to law," evidently contemplating none but American vessels, and the obvious reason was to guard against British captures. For this purpose, it was believed that the property would be safer in American than in foreign ships.—American produce in foreign vessels, would be considered *prima facie* by the British, as enemy's goods.

2. In the case of the Henrietta, he violated his instructions, by not shipping the tobacco for his own account and risk, but for that of Longhy, of Genoa.—That the property should be shipped in his own name, as a citizen of the United States, is the alpha and omega of the instructions.

It is true that we were in a state of limited hostility with France. But it being, in fact, Spanish property, and Spain being the ally of France, there was no danger of French condemnation. At that time, too, Great Britain hoped and expected that the United States would have joined her in the war. There was less probability, therefore, that she would commit depredations upon American property, than upon that of any other nation. But Genoa was either a province of France, or a very humble and submissive ally. To ship the property, therefore, as that of a Genoese, was to place it in the most dangerous situation possible as to British cruisers. This was done, no doubt, with good intentions, but with a weakness of judgment truly astonishing, and in direct violation of instructions.

2. The 2d question is, was he justified by any part of the letter in substituting his own judgment for that of his principals, in opposition to the positive injunctions of his instructions? He was to exercise his judgment only in cases not provided for by those instructions; but where they were precise and positive, he had no discretion. The great object of the whole letter

MANELLA, PUJALS & Co. v. J. BARRY.

was, that the property should not appear to belong to a foreigner. Language is useless if it is not to be regarded. No man can be safe in commerce, if his orders are not to be obeyed. All confidence will be destroyed, and commerce must cease. The general expressions of the letter cannot be supposed to revoke all the specific orders, and give unlimited powers. For what purpose were those specific orders given, if a general and unlimited authority was conferred? The general expressions mean no more than this:—We depend upon your fidelity and judgment in executing our orders. All the parts of the letter are to be taken together, so as to give effect to the whole.

He has not pursued his instructions with respect to the price. *Expressio unius est exclusio alterius.* By naming a price, they must be understood as restricting the defendant to that limit.

The defendant, then, is not justified by any thing in the letter itself. Is he justified by the authority of Menendez?

It is not proved that Menendez was an agent; or that, if he was, he had any power to dispense with the precise instructions contained in the letter of 27th of January. His declarations are not evidence, unless he is first proved to be an agent. It does not appear what authority he had. His private instructions might be very limited. It is not to be presumed that he had authority to vary the particular instructions contained in the letter. If he had, can it be believed that the defendant did not require him to produce them? He knew that he was about to act contrary to his instructions, and that he was taking a great responsibility upon himself. He ought to have taken a copy. The burden of proof lies on him.

But why not produce the testimony of Menendez? The cause has been pending five years in the court below. [It was answered, that he had gone to Spain; that a commission had been sent there, but the commissioners refused to act, or the witness kept out of the way.] Does the letter itself show such an author-

ity vested in Menendez? It calls him agent, and refers the defendant to his verbal communications. But *how* agent? for what purpose? To see that their orders were duly executed; and to make verbal communications not inconsistent with the written orders.

If agent, will that convert the letter into a set of hints instead of instructions? If he was their general agent, with full powers, why write particular instructions to the defendant? The agent would have kept the instructions in his pocket. They would have been written to him, and not to the defendant.

But how was he agent? 1st. As to the price. 2d. To superintend the shipments, within the limits of the instructions. 3d. To select tobacco of the proper quality to suit the Spanish market. His duty and authority were like those of a supercargo. He was an agent, even if he had only a particular authority. In order to constitute an agent, it is not necessary that he should have general powers. If his powers are not to be considered as restricted, we must violate that rule of construction which would give effect to the whole instrument, if possible. "*Para presentiar la expedicion.*" The word *expedicion* means *shipment*, not the whole enterprise. He was to *communicate* with the defendant as to the whole enterprise, but not to controul it. But supposing the expression to mean, that *Menendez* was to superintend the enterprise, it can only mean that he should see that the enterprise was conducted according to the instructions, and not that he should sanction a violation of them. It was to see that they should be fulfilled, not disobeyed. But the phrase *para presentiar*, does not mean "*to superintend;*" it only means that he should *assist*. It is translated into the French language by the word *assister;* to be present at, to partake of. But if we take the English meaning of the word *assist;* the question occurs, how assist? Certainly, according to the instructions. The very next sentence in the letter contradicts the idea of a general agency. The words are, "and *you*," (in the singular number) "will upon the whole act for the advantage of the interested." The discretion, if any, was given to the defendant himself, and not to Menen-

MANELLA, PUJALS & Co. v. J. BARRY.

dez. He was only to be consulted and advised with. In any point of view in which it can be placed, it does not justify the idea, that a power was given to controul the orders to give the property an American character.

W. Pinckney and *Martin*, contra. The points of this case are few, and float upon the surface. They depend upon the construction of the orders, and the authority of Menendez. Menendez was not the casual bearer of the letter of instructions to the defendant, but sent on purpose; his sole business was to superintend this transaction. The defendant agreed to undertake the business; he entered upon his duty, and endeavoured to discharge it with fidelity. This action is, therefore, grounded on the ungracious idea, that in performing his duty to the best of his judgment, he has erred. The defendant is not charged with fraud, or intentional injury. It is, therefore, an action *stricti juris*.

When the nature of this transaction is considered, the fraud meditated upon the Spanish government by the double sets of invoices, and the neutral cover attempted for the property, the plaintiffs come with an ill grace into a court of justice to charge a loss upon the defendant, for a mere error of judgment, while acting with honour and fidelity, and exercising his discretion for their advantage, to the best of his ability.

If there was any ambiguity in the letter, it was the fault of the plaintiffs; and, to take advantage of it now, would be fraudulent. If that ambiguity was intended, it would be base and dishonourable. The plaintiffs ought to have explained themselves. The defendant, at 3,000 miles distance, could not consult them, and he cannot be chargeable for an error, if any, upon a point of the instructions in itself ambiguous.

Verba fortius accipiuntur contra proferentem.

The demand consists of three *items*:

1. The excess of price beyond that limited by the instructions.

2. The price of the cargoes shipped in the Moorish and Danish vessels.

3. The cargo of the Henrietta, not shipped in the defendant's own name, but in that of Don Carlos Longhy, of Genoa.

1. We had supposed that the question of price had been abandoned.

We contend that the price limited, meant clear of all charges, subsequent to the purchase in this country. The limitation was to guide the defendant in his *purchases;* but he could not say at the time of purchase, what charges might arise upon it before it would be in his power to ship it.

We contend, also, that it meant the average of the whole, and not of any particular parcel.

2. The demand for the cargoes shipped in the Moorish and Danish vessels, rests on the allegation that the defendant was bound by his instructions to employ American vessels only.

The only word in the instructions relative to this point, has been misinterpreted by the counsel for the plaintiffs. He has supposed that the orders were to *find* "captains of fidelity, American born." But the letter only directs him to "seek" such, but he was not bound to *find* them. The bill of exceptions shows that he sought for American vessels, but they could not be found. It is on the *letter*, not on the *spirit* of the instructions, that the plaintiffs will put their case.

The defendant was bound to prevent delay; if he could not find American captains of the description mentioned, he was not justified in waiting. The only condition was, that the shipment should not be made in less than six vessels. In no other part of the letter are the

MANELLA, VJALS & Co. v. J. BARRY.

vessels designated; yet there is another part where it might have been expected. The *simulated* insurance was to be made in America, the *real* in Europe. The conditions of the real insurance are stated; but it is not one of them, that the property should be shipped in American vessels. There was no necessity to discriminate between American and other neutral vessels. The policy of Great Britain was to conciliate all neutral nations, particularly the northern. And having never given up the principle upon which American, as well as British naval greatness depends, the right to take belligerent property out of neutral ships, she would search for it as strictly in American, as in Danish or Moorish vessels.

But our vessels were not absolutely neutral as to France. Our flag was suspected of covering enemy-goods by one party, and was the object of plunder, if not of hostility, to the other.

There was no reason, therefore, for preferring our vessels. The insurance would be made upon property in neutral vessels generally.

But it is said, that it would be a suspicious circumstance, that American property should be shipped in any other than American vessels. This is by no means a strong argument; because our tonnage is not always sufficient for our commerce.

3. As to the shipment by the Henrietta. Was it justified either by the instructions or by the authority of Menendez?

The great object of the instructions was to cover the property as neutral. The defendant was bound to keep this constantly in view. When, therefore, in August, 1798, America had ceased to be neutral, he was not only not bound to ship the tobacco in his own name, but would have been liable to an action if he had. The reason of shipping it in his own name had ceased. He was no longer an unsuspected neutral, but a belligerent. Affairs with France had come to a crisis. Actual hostilities had commenced. The state of things was materially changed. What was he to do? He could not consult

his principal. If in such circumstances he acted with good faith; and according to his best judgment pursued the spirit of his instructions, they who would subject him to an action ought to blush.

It would be strange, indeed, if he should not, in such a case, have some discretion. Every agent must, in the nature of things, have a discretion to vary from the precise letter of his instructions, to carry into effect their general intent.

But he has this discretion in express terms: "You will, *upon the whole*, act for the advantage of the interested." We do not contend for an unlimited discretion. We admit, that it is limited by the general scope and spirit of the instructions. If he had given a belligerent character to the property, then, indeed, he would have been liable. The injunction to keep the business secret, was only "to prevent a rise in" the American "market." It applied only to the transactions in this country. Let us then see how the defendant conducted himself in this unforeseen state of things. As he could not consult his principals, he took the advice of Menendez, their acknowledged agent, who had come for the sole purpose of superintending this expedition, who the plaintiffs said in their letter would communicate verbally with the defendant upon that subject, who was the bearer of the particular instructions to the defendant, and who alleged that he had private instructions from the plaintiffs, and authority to give the orders which he gave.

If the letter to the defendant was ambiguous, who so capable of explaining its meaning as Menendez, the confidential agent of the plaintiffs? Their letter to the defendant, by Menendez, was a letter of credit and confidence. The defendant was bound to place confidence in the representations of Menendez. If he exceeded his authority, they, and not the defendant, must suffer. How could the defendant know when he was imposed upon by Menendez? What reason had the defendant to doubt the truth of his verbal communications, when the plaintiffs themselves had referred him to those verbal communications? He had no cause of suspicion; the advice of Menendez was reasonable, it was judicious,

MANELLA, PUJALS & Co. v. J. BARRY.

and consistent with the general scope of the enterprise. If the law will not protect a man acting honourably under such instructions, and in such circumstances, the law is a system of fraud.

Don Carlos Longhy, of Genoa, was the person pointed out by the plaintiffs themselves, as the person to whom the tobacco should be ostensibly consigned in a certain event. He was, therefore, a person in whom the plaintiffs could place confidence. He was a neutral, while the defendant was not. When Menendez ordered the shipment to be made in his name, the defendant had no cause to suspect that he exceeded his authority. But if he did exceed his authority, who ought to suffer? The plaintiffs who placed their confidence in him, or the defendant who was required by the plaintiffs to give him credit?

But we are asked, why have we not examined Menendez as a witness? We answer, that a commission has been sent to Spain for that purpose; the commissioners have refused to act, and have sent back the commission. But the question may be retorted upon the plaintiffs. Why have *they* not examined Menendez? Nay, why have they not brought their action against him? If any injury has been done, he is the author of it. *He* directed, and *he* approved, all the acts of the defendant.

But the plaintiffs themselves have affirmed the very conduct of the defendant of which they complain.—The two shipments by the *Felicity*, and the *Susanna*, were made in the same manner as that by the Henrietta, and were received by the plaintiffs. By what rule can they affirm his conduct when it turns out for their benefit, and disaffirm the like conduct when a loss has happened?

P. B. Key, in reply. We admit that words are to be construed most strongly against him who uses them, and that where ambiguity exists, the construction will be against him who ought to have explained himself. But the question is, whether any ambiguity exists—whether this is not a clear limited agency. The de-

fendant was limited as to the subject, the price, the consignment, the name of the shipper, the vessels, the captains, and the crew—there was nothing left but a discretion bounded by these limitations; and the authority of Menendez did not exceed that of the defendant.

They had either a general discretionary power, or they were limited by the letter of their instructions.—If they had a general discretion, why give special and precise instructions?

It is plain that no vessels were contemplated by the plaintiffs but American vessels. We do not contend that the strict letter of the instructions directs the defendant to *find* captains, American born, but we say that such is the spirit and meaning of the instructions. That the whole transaction, from beginning to end, was to bear the appearance and stamp of the American character. But how unnatural must it appear, to see an American cargo shipped on board a Moorish vessel. This circumstance is so singular, as in itself to be a strong ground of suspicion, especially as our vessels are seeking for employment in every part of the world.

But in the case of the Henrietta, the very letter, as well as spirit, of the instructions has been violated.—The instructions are precise and positive, that the defendant should ship the tobacco for his own account and risk.

To justify a departure from these positive orders, it is incumbent on the defendant to show a clear authority in Menendez to dispense with them. No such authority has been proved, and none can be presumed. The specific instructions contradict such a presumption. For why give the defendant special orders, if the whole general agency was in Menendez? Or why were they sent to the defendant, if he was not to be bound by them? The fair presumption is, that the verbal communications referred to, were to be only a further detail of the same plan, and not a general dispensation from the orders already given.

MANELLA, PUJALS & Co. v. J. BARRY.

The general expression which is relied on, that the defendant should "upon the whole, act for the advantage of the interested," is in the same breath qualified by the directions to keep it secret, that the business was on account of *foreigners*, and by the positive injunction that it should always appear to be on his own account as an *American* citizen. This is in perfect conformity to the request in the beginning of the letter, "you will view this measure *as your own*," and shows most clearly their determination to risk their property under an *American* cover only. The same limitation also applies to the reference which the plaintiffs make to the verbal communications of Menendez; it is included in the same sentence, and is evidently intended to apply, as well to those verbal communications, as to the general power to act for the advantage of the concerned. The defendant, therefore, had no right to presume that Menendez had authority to alter the principal character of the risk, and to compel the plaintiffs to accept a Genoese, instead of an American cover.

The defendant derived no sanction to his conduct from the plaintiffs receiving the cargoes of the *Felicity* and the *Susanna;* that circumstance was unknown to the defendant at the time of the shipment by the Henrietta.

The limitation of price meant to include all the costs and charges in America. The words are, "it will not answer them at more than ten dollars per quintal *in America*." The cost and charges in America, make part of its price in America.

It is no argument to say, that the defendant could not regulate his purchases, if the price, including those charges, was to be limited, because those charges were uncertain.

The usual and customary charges were well known to the defendant, and he was bound to calculate his purchases accordingly. If, indeed, any accidental and unusual charge had been necessarily incurred, this would have been properly chargeable to the plaintiffs, but the letter evidently meant that the tobacco should

not amount to more than ten dollars a quintal, including customary charges.

Upon the whole, then, we contend, that the defendant has violated not only the letter, but the spirit of his instructions, and that he was not justified by the authority of Menendez.

February 26.

MARSHALL, C. J. delivered the opinion of the court.

The court has endeavoured to bestow on this cause, the attention to which it is alike entitled, by its own importance, by the situation of one of the parties, who is a stranger to our language and our laws, and by the ability and zeal with which it has been argued at the bar.

The action claims from the defendant, the value of three cargoes of tobacco, purchased by him as the agent of the plaintiffs, which were captured on a voyage to Europe, and condemned as prize. The foundation of the claim is, that he deviated from the instructions which were given for the government of his conduct, and is, therefore, liable for the loss which has been sustained.

That an agent is bound to pursue the orders of his principals, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law which has not been drawn into question; and the only inquiry in this case is, has the defendant obeyed or deviated from his instructions? The circuit court was of opinion that they sanctioned his conduct, and it is the propriety of that opinion which is now to be reviewed in this court.

It depends on the true construction of the letter of the 27th of January, 1798, written by Bernardo Lacosta, on behalf of the plaintiffs, of which Juan Alonzo Menendez Conde was the bearer, and on the testimony which is stated in the bills of exceptions.

MANELLA, PUJALS & Co. v. J. BARRY.

This letter introduces Menendez as the agent of the plaintiffs, who were principally concerned in the importation of tobacco into Spain, and declares a confidence that the defendant will embrace the business as his own, and execute it with his wonted attention.

After some general observations which relate to the proposed transaction, and which seem to be founded on the idea that the defendant and Menendez are to be associated in the business, the letter becomes more definite. The writer says, "with this the said Mr. Menendez takes an order for 20,000 quintals (of tobacco) to be shipped for this place in seven or eight vessels, and in not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews conform to the most rigorous ordinances. For greater clearness the shipments *(las expediciones)* will be made according to the following formalities: 1st. You will lade the vessels in your own name, stating that they are on your own account and risk as an American citizen, and consign them," &c.

This instruction is followed by ten others, which seem principally designed to conceal the real character of the cargoes, and to facilitate their escape from cruisers.

At the close of these instructions, the following words are added: "I refer you to that which the bearer will communicate to you verbally, respecting this business, who is sent on purpose to superintend the shipment *(va solo para presenciar la expedicion)* and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen."

In the execution of this commission, the defendant shipped two cargoes, the one on board a Danish and the other on board a Moorish vessel, each of which was captured and condemned as prize, the one by the French, and the other by the English.

These shipments were made with the full approbation of Menendez, and it is in proof that American vessels were not, at the time, to be procured.

Before the order was completed, the government of the United States, adopted such measures, for repelling the hostile aggressions of France, as to justify an opinion, that open and declared war between the two nations, would soon take place. Under the impression of these measures, Mr. Menendez considered the American name as no longer affording a neutral character to the cargo, and directed it to be shipped on account and risk of Charles Longhy, of Genoa, who was a correspondent of the plaintiffs. These instructions were complied with.

The tobacco so shipped, which came safe, was received without complaint; but a large quantity, shipped in the Henrietta, was captured by a British cruiser, carried into Halifax, and there condemned as prize.

For the price of these three cargoes this action is brought. The inquiry respecting the two first, will rest, both on the instructions given to the defendant, and on the power of Menendez: that respecting the last, rests solely on the power of Menendez.

It is alleged, that the orders under which the defendant acted, enjoined him to employ only American vessels and that in employing those of other neutral powers, he violated these orders. But there is certainly not one syllable in the letter, which contains any instruction to the defendant, relative to the employment of vessels, or which confines the transportation of the tobacco to be purchased, to American vessels. The court thinks it a fair construction of the letter, that full powers, in this respect, were confided to Menendez, and that Barry might counsel with him, but was to comply with his directions. Menendez is declared to be the agent of the plaintiffs, and the full extent of this term is not limited in any part of the letter. He brings with him an order for 20,000 quintals, to be shipped in six, seven, or eight vessels, under which condition the insurance is to be made in Spain.

MANELLA, PUJALS & Co. v. J BARRY.

These are not instructions to Barry; they are communications to him of the instructions given to Menendez, so far as was necessary for his understanding the views of the plaintiffs, and facilitating those views, under the authority of Menendez. The order, of which Menendez was the bearer, was for himself, and the degree of aid expected from Barry, is described in the letter. Barry might have been unable, or unwilling to undertake the business. In any event of that kind, the enterprise was not, certainly, at an end; but Menendez might obtain other assistance. From the nature of the case, therefore, as well as from the expression of the letter, the order was in the possession and power of Menendez, the agent, to whom directions relative to the shipment of the tobacco, in a certain number of vessels, had been given, and who is declared to have been sent to America, for the purpose of superintending those shipments. Having made this explanation of the business confided to Menendez, the letter adds, "you will take care to seek captains of fidelity, American born," &c. Those inquiries, Barry, an American merchant, could make, much more successfully, than Menendez, a foreigner, and, therefore, was directed to make them. But respecting the character of the vessel to be employed, no agency, on the part of Barry, was necessary, further than to comply with such directions as he might receive, and no directions respecting the vessels to be employed, were given him, because those directions were given to Menendez. The instructions to Barry, to seek for American captains, are founded not upon instructions to employ American vessels, which were given to him, for none such were given, but upon the instructions which were given to Menendez. They are founded on the idea, that American vessels would be employed; but as circumstances might render the employment of them ineligible, it was reasonable to suppose that some discretion would be allowed to Menendez in this respect; accordingly, the private instructions, as stated in the bill of exceptions, only directed him to employ neutral vessels.

The idea that the power on this subject was completely in Menendez, and not in Barry, is confirmed, by observing that in the extended and minute rules, which are, for greater clearness, laid down for his government respecting the transportation of the tobacco, not one sylla-

ble is said concerning the character of the vessels in which it was to be shipped, a direction which would certainly not have been omitted, had the subject not been confided to the general agent. It is also apparent, from the letters in the bill of exceptions, that the subject was so understood by both Menendez and Barry. When to these circumstances it is added, that American vessels were sought for at the time, and could not be obtained, it seems to the court perfectly clear, that with respect to the tobacco shipped in the Moorish and Danish vessels, the conduct of the defendant being sanctioned by Menendez, was free from all exception.

The claim for the cargo of the Henrietta, stands on stronger ground, because the defendant was explicitly instructed to lade the vessels in his own name, stating that the cargoes were shipped on his own account and risk. On this part of the case, the defendant must seek for a justification in the full powers of Menendez, to vary the orders given to him. These orders have been said to be free from all obscurity, and in themselves they unquestionably are so. Barry could not have doubted the positiveness of his instructions, to ship the tobacco as his own property. The defence he sets up is, that he was justified in conforming to the directions of Menendez, varying those instructions.

An examination of this defence, leads to a still more critical investigation of the letter of the 27th of January.

It has been already observed, that Menendez is stated in the letter, introducing him o Barry, to be the agent of the plaintiffs, and the bearer of their orders for the tobacco, which was to be purchased. As it was not unreasonable to expect that a person, crossing the Atlantic in this character, would have some discretionary power to change instructions with a change in circumstances, so as to be enabled to adapt his conduct to those circumstances, ready faith would be given to all expressions which would convey this idea; and if no such power was intended, no expressions ought to have been used, which could excite and cherish the idea.

The rules stated to Mr. Barry, as those by which his conduct would be governed, are declared to relate to the

MANELLA, PUJALS & CO. v. J. BARRY.

part he was expected to take in the "*expedicion*," which the court translate *transportation*, or conveyance of the tobacco to Europe. One of these being, that the tobacco was to be shipped in his own name, it follows that this part of the subject was included in the Spanish term "*expedicion*." All these rules conclude with a reference to verbal communications, to be made by the agent himself, who is expressly declared to go to the United States for the sole purpose of attending to this very part of the transaction, "*va solo para presenciar la expedicion.*" This reference to the verbal communications of Menendez, unqualified by any restriction whatever, is a declaration of complete confidence, placed at least in his veracity, by the plaintiffs, and is a full authority given by them to Barry, to credit the representations which he should make. How else is it to be understood? What right could Barry have to say to those who had referred him to the verbal communications which their agent should make to him on a particular subject, that he did not believe those communications?

It is argued, that although no limitation is expressed to the credit which Barry was to give to the representations of Menendez, yet it must be necessarily understood, that he could not change those things which were expressly directed; that the verbal communications referred to, were to be conformable to, not subversive of, the written instructions; that on the idea of a power to alter the written instructions, it was useless to give them, and was only necessary to send out Menendez with a full authority to govern the whole transaction.

But in the course of human affairs, it is not unusual for a principal to give, in detail, his ideas of the line of conduct to be observed by his agent, and yet to allow a departure from that line of conduct, under particular circumstances.

It would not have been extraordinary, had these rules, for the conduct of Barry, been followed by a declaration, that in a total change of circumstances, as in the event of America's becoming a belligerent, he was to ship the tobacco, not as American, but as neutral property. Had Barry been the sole agent, this right to exercise his discretion, if intended to be placed in him, would have

been mentioned in his letter. But Barry was neither the sole nor the principal agent. He was known to the plaintiffs only by recommendation, and while he was employed, because an American merchant could make the proposed purchases to greater advantage, and because an American name was required to cover the property. Menendez was the confidential agent, known to and trusted by the plaintiffs, who brought with him the order for the purchases, and came on purpose to attend to the conveyance of the tobacco to Europe. In the instructions to Menendez, therefore, would any discretion relative to the transportation of the tobacco be found, and it was enough that Barry was referred to his verbal communications.

The words which follow the reference to the verbal communications of Menendez, though not those which decide the opinion of the court, are not absolutely unimportant: they are, "and you will, upon the whole, act for the advantage of the parties interested." To what do these words, "upon the whole," refer? Unquestionably to the verbal communications as well as to the written instructions. They were both to regulate the conduct of the defendant. The caution which follows these words, is understood by the counsel for the plaintiffs, to limit their extent, and to direct, that in acting for the advantage of the interested, he was yet to keep secret, that the tobacco belonged to foreigners.

There is, unquestionably, great force in this observation; and if the justification of Barry rested solely on the power given him in this clause, to act for the best, it would be doubtful how far it would avail him. The court, however, considers those words principally applying to the purchases, and as indicative of an expectation that a state of things would remain, in which the tobacco was to retain the character of American property, rather than as limiting the powers of Menendez over this part of the subject, in the event of such a revolution as would make America a belligerent. The court forbears to make a critical examination of the words, because its opinion is formed on the character in which Menendez came to America, as stated in the letter introducing him to Barry. That letter warranted the belief that he was the prin-

MANELLA, PUJALS & Co. v. J. BARRY.

cipal and confidential agent of the plaintiffs; that he had particular instructions for the government of his conduct, and that Barry was to receive and trust his verbal communications, especially on the subject of expediting the tobacco to Spain. It is impossible to read the letters from Menendez to Barry, which form a part of the bill of exceptions, without feeling a conviction that this was the understanding of the parties. He approves the conduct of the defendant, in the stile of a man whose approbation gave a sanction to it, and when he directs the shipments to be made in the name of Charles Longhy, of Genoa, he says, "if you act conformably to what I have here mentioned, as to further shipments, I, from this moment, approve thereof, and that it may appear, *and to save you from any accident that may occur*, as also, that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order, that at no time whatever, you should be chargeable with the consequences." Such was the opinion which the confidential agent of the plaintiffs, in possession of their private instructions, entertained of his own powers.

He was not mistaken in their extent; at least, the defendant had no right to believe him mistaken. On his arrival, he declared to Barry, that he was in possession of private instructions, distinct from those which were contained in the letter of the 27th of January. He produced those instructions. The chief clerk of Barry read so much of them as related to vessels, and they did not require that the shipments should be made in American, but in neutral vessels; and in the letter of Menendez to the chief clerk, dated on the 14th June, and accompanying that of the same date, addressed to the defendant, directing him to ship the tobacco as the property of Charles Longhy, of Genoa, he says, referring to a copy of his private instructions, "you will see that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of a neutral subject." What right had he to suspect that the confidential agent of the plaintiffs, to whose verbal communications they referred him, had forged instructions which he produced as those of his principals?

The counsel for the plaintiffs, question the existence of these private instructions, and demand their produc-

tion. But how were they to be authenticated? Only by Menendez himself. Are not then their contents to be proved by the declarations of Menendez, by his stating them, and by the chief clerk of Barry, who read a part of them?

To the court, it appears, that in such a case as this, the proof respecting them is as ample and satisfactory as ought to be required.

After taking this extensive view of the case, of the powers of Menendez, and of the confidence the defendant was bound to repose in him, it only remains briefly to observe, that the directions he gave were not such as to awaken suspicion.

On the 14th June, 1798, when these instructions were given, America had ceased to be a neutral power. War, it is true, was not formally declared, but it had commenced in fact, and hostilities were authorised by that department of the government which is invested with the power of making war. In such a state of things, the course which prudence would have dictated to the plaintiffs, had they been themselves in the United States, certainly was to cover the tobacco as neutral, not as American property, and when their agent, possessing private instructions, directed the property to be shipped as neutral, not as American, the defendant would have been culpable in thwarting him.

It is scarcely necessary to add, that Menendez stated himself to be, and probably was, something more than an agent. He declared himself to be interested in the cargoes. This declaration, under all the circumstances of the case, was not to be discredited. Upon that, however, the judgment of the court is not founded. The letter of the 27th January, represented him as the principal and confidential agent of the plaintiffs, whose verbal communications were to be trusted. He declared himself to possess particular instructions respecting a transaction which he came to superintend, and under those instructions he gave orders which the defendant has obeyed. The court is of opinion, that in so doing, the defendant is justifiable, and no error has been committed in the court below, in so instructing the jury.

MANELLA, PUJALS & Co. v. J. BARRY.

Upon the other part of the exceptions, the price given for the tobacco, it is unnecessary to say more, than that there is no error in the opinion of the court.

Affirmed.

EX PARTE BURFORD

EX PARTE BURFORD.

A warrant of commitment by justices of the peace, must state a *good cause certain, supported by oath.*

JOHN ATKINS BURFORD, a prisoner confined in the jail of the county of Alexandria, in the district of Columbia, petitioned this court for a *habeas corpus*, to inquire into the cause of his commitment, alleging that he was confined under and by colour of process of the United States, and praying for a *certiorari* to the clerk of the circuit court of the district of Columbia, for the county of Washington, to certify the record by which his cause of commitment might be examined, and its legality investigated. To the petition was annexed a copy of his commitment, certified by the jailor of Alexandria county.

Hiort, for the petitioner, observed, that he was aware of the decision of this court in the case of *Marbury* v. *Madison*, *ante*, *vol.* 1, that a *mandamus* would not lie in this court when it operated as an *original* process; but there is a vast difference between a *mandamus* and a writ of *habeas corpus*. The former is a high prerogative writ, issuing at the discretion of the court, but this is a writ of right, and cannot be refused. The constitution of the United States, *art.* 1, § 9, declares, "that it shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

By the 14th section of the judiciary act of 1789, *vol.* 1, *p.* 58, it is enacted, "that all the before mentioned courts of the United States," (including the supreme court) "shall have power to issue writs of *scire facias*,

habeas corpus, and all other writs," &c. "And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment." If a single justice of this court has the power, it would be a strange construction of the law, and of the constitution, to say that the whole court cannot exercise the same power.

The reason why this court could not exercise its appellate jurisdiction in a criminal case, was stated in the case of the *United States* v. *More*, *ante*, *p.* 159, to be because no mode of exercising it had been appointed by law, the writ of error extending only to civil cases. But if this is an exercise of its appellate jurisdiction, the mode by *habeas corpus* is expressly provided by the statute, for that purpose.

March 4.

MARSHALL, Ch. J. There is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favour of liberty, was willing to grant the *habeas corpus*. But the case of the *United States* v. *Hamilton*, 3 *Dal.* 17, is decisive. It was there determined that this court could grant a *habeas corpus*; therefore, let the writ issue, returnable immediately, together with a *certiorari*, as prayed.

Upon the return of the *habeas corpus*, and *certiorari*, it appeared, that on the 28th of December, 1805, Burford was committed to the jail of Alexandria county, by a warrant under the hands and seals of Jonah Thompson, and *ten* other justices of the peace for that county; which warrant was in the following words:

Alexandria County, ss.

Whereas John A. Burford, of the county aforesaid, shopkeeper, has been brought before *a meeting of many of the justices* of the peace for the said county, and by them was required to find sufficient sureties to be bound

EX PARTE BURFORD.

with him in a recognizance, himself in the sum of *four thousand* dollars, and securities for the like sum, for his *good behaviour* towards the citizens of the United States, and their property; and whereas the said John A. Burford hath failed or refused to find such sureties; these are therefore in the name of the United States, to command you the said constables, forthwith to convey the said John A. Burford to the common jail of the said county, and to deliver him to the keeper thereof, together with this precept; and we do, in the name of the said United States, hereby command you, the said keeper, to receive the said John A. Burford into your custody, in the said jail, and him there safely keep, until he shall find such sureties as aforesaid, or be otherwise discharged by due course of law. Given under our hands and seals, this 28th day of December, 1805.

To any constable, and the jailor of the county of Alexandria.

On the 4th of January, 1806, the circuit court of the district of Columbia, sitting in the county of Washington, upon the petition of Burford, granted a *habeas corpus*, and upon the return, the marshal certified, in addition to the above warrant of commitment, that Burford was *apprehended* by warrant, under the hands and seals of Jonah Thompson, and *thirteen* other justices of the county of Alexandria, a copy of which he certifies to be on file in his office, and is as follows:

Alexandria County, ss.

The undersigned justices of the United States, assigned to keep the peace within the said county, to the marshal of the district, and all and singular the constables, and other officers of the said county, Greeting:

Forasmuch as we are given to understand, from the information, *testimony* and complaint of *many credible persons*, that John A. Burford, of the said county, shop-keeper, is *not of good name and fame*, nor of honest conversation, but an evil doer and disturber of the

peace of the United States, so that murder, homicide, strifes, discords, and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, *are likely to arise thereby*, Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the body of the aforesaid John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient *surety and mainprize for his good behaviour* towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided.

And this you shall in no wise omit, on the peril that shall ensue thereon, and have you before us this precept. Given under our hands and seals, in the county aforesaid, this 21st day of December, 1805.

The circuit court, upon hearing, remanded the prisoner to jail, there to remain until he should enter into a recognizance for his good behaviour for one year, himself in the sum of 1,000 dollars, and sureties in the like sum.

Hiort, for the prisoner, contended, that the commitment was illegal, both under the constitution of Virginia, and that of the United States. It does not state a *cause certain, supported by oath.*

By the 10th article of the bill of rights, of Virginia, it is declared, that all warrants to seize any person whose offence is not *particularly described*, and *supported by evidence*, are grievous and oppressive, and ought not to be granted.

By the 6th article of the amendments to the constitution of the United States, it is declared, "that on warrants shall issue but upon probable cause, *supported by oath or affirmation.*"

Ex parte Burford.

By the 8th article it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him; and the 10th article declares, that excessive bail shall not be required.

In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of *that* arrest, but of his commitment to prison. The question is, what authority has the jailor to detain him? To ascertain this, we must look to the warrant of commitment only. It is that only which can justify his detention. That warrant states no offence. It does not allege that he was convicted of any crime. It states merely that he had been *brought* before a *meeting* of *many* justices, who had required him to find sureties for his good behaviour. It does not charge him of their own knowledge, or suspicion, or upon the oath of any person whomsoever.

It does not allege that witnesses were examined in his presence, or any other matter whatever, which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for the malicious prosecution? or whom could he indict for perjury?

There ought to have been a *conviction* of his being a person of ill fame. The fact ought to have been established by testimony, and the names of the witnesses stated. *Boscawen on Convictions*, 7, 8, 10, 16, 110. *Salk.* 181.

But the order was oppressive, inasmuch as it required sureties in the enormous sum of 4,000 dollars, for his good behaviour *for life*.

If the prisoner had broken jail, it would have been no escape, for the marshal is not answerable, unless a *cause certain* be contained in the warrant, 2 *Inst.* 52, 53, and the reason given by *Blackstone*, 1 *Com.* 137, why

the warrant must state the cause of commitment, is, that it may be examined into upon *habeas corpus*. And in *vol.* 4, *p.* 256, speaking of the power of a justice to require sureties for good behaviour, he says, "But if he commits a man for want of sureties, he must express the cause thereof with convenient certaintv, and *take care that such cause be a good one. Rudyard's case*, 2 *Vent.* 22.

Swann, on the same side, was informed by the court, that he need not say any thing as to the original commitment by the justices, but might confine his observations to the re-commitment by the circuit court, upon the *habeas corpus*.

He observed, that the circuit court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited its duration to one year. It passed no new judgment, but merely remanded the prisoner—it heard no evidence—it was not a proceeding *de novo*—it gave no judgment—it convicted the prisoner of no offence. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit court is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality.

The Judges of this court were unanimously of opinion, that the warrant of commitment was illegal, for want of stating *some good cause certain, supported by oath*. If the circuit court had proceeded *de novo*, perhaps it might have made a difference. But this court is of opinion, that that court has gone only upon the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain. If the prisoner is really a person of ill fame, and ought to find sureties for his good behaviour, the justices may proceed *de novo*, and take care that their proceedings are regular.

The prisoner is discharged.

HOPKIRK v. BELL.

HOPKIRK v. BELL.

The treaty of peace between Great Britain and the United States prevents the operation of the act of limitations of Virginia upon British debts contracted before that treaty.

An agent for collecting of debts merely, is not a *factor* within the meaning of the 13th section of that act.

THIS was a case *certified* from the circuit court for the fifth circuit, and Virginia district, in chancery sitting, in which the opinions of the judges (*Marshall, Ch. J.* and *Griffin, district judge*) were opposed upon the following question:

"Whether the act of assembly of Virginia for the limitation of actions pleaded by the defendant was, under all the circumstances stated, a bar to the plaintiff's demand founded on a promissory note given on the 21st day of August, 1773?"

The certificate contained the following statement of facts agreed by the parties, viz.

That David Bell, the defendant's testator, had considerable *dealings* with the mercantile house of Alexander Spiers, John Bowman & Co. (of which house the plaintiff was surviving partner) in the then colony of Virginia, *by their factors who resided in that colony*, and on the 14th of March, 1768, gave his bond to the company for 633l. 8s. 11d. 1-2, conditioned for the payment of 316l. 14s. 5d. 3-4 on demand. That he also became farther indebted in a balance of 121l. 0s. 4d. 1-2, an open account for dealings afterwards had with the company by their said factors. That on the 21st of August, 1773, Henry Bell, the defendant, made his writing, or promissory note, under his hand, attested by two witnesses, in the following words, to wit: "I do hereby acknowledge myself to stand as security to Messrs. Alexander Spiers, John Bowman, & Co. of Glasgow, for the sum of four hundred and thirty seven pounds, fourteen shillings and ten-pence, current money of Virginia, being a debt due them by my father, David Bell. Given under my hand, this twenty-first day of August, one thousand seven hundred and seventy-three. I am not to pay the above till it is convenient."

That the said Alexander Spiers, John Bowman, & Co. were, at that time, British subjects, merchants, residents in Glasgow, in the kingdom of Great Britain, and have never been resident within the limits of the then colony, now state of Virginia, and that James Hopkirk, the surviving partner, now is, and always has been from the time of his birth, a British subject, resident in the kingdom of Great Britain, and was never within the limits of the commonwealth of Virginia. That the company had a factor or factors resident in the commonwealth of Virginia on the 21st of August, 1775, when the note was given, and from that time to the commencement of the American war, viz. on or about the first of September, 1776. That the company had neither agent or factor in this country, authorised to collect their debts, from the commencement of the war in 1776, until the year 1784. That on or about the 10th of September, 1784, and ever since, an agent has resided in this commonwealth, authorised by power of attorney, generally to collect all debts due to the company in this commonwealth.

That by the fourth article of the definitive treaty of peace, between the United States and his Britannic majesty, made on the third of September, 1782, "it is agreed, that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted." And by the second article of the convention between his Britannic Majesty and the United States, made on the 8th of January, 1802, "the said fourth article," (of the treaty of peace) "so far as respects its future operation, is recognised, confirmed, and declared to be binding and obligatory," "and the same shall be accordingly observed with punctuality and good faith, and so as that the said creditors shall hereafter meet with no lawful impediment to the recovery of the full value in sterling money, of their *bona fide* debts."

That by the acts of the Virginia assembly, passed on the and the practice of the courts, British creditors, their agents, and factors, were prevented from suing with effect for their debts in the courts of this commonwealth, from the

HOPKIRK v BELL.

day of April, 1774, until the year 1790—and that this suit was commenced on the 4th of Jan. 1803.

By the fourth section of the Virginia act of limitations, *p. p.* 107, actions upon the case on accounts are to be brought within five years after cause of action. By the twelfth section there is a saving of persons *beyond seas;* but by the thirteenth section it is provided, "that all suits hereafter brought in the name or names of any person or persons residing beyond the seas, or out of this country, for the recovery of any debt due for goods *actually sold and delivered here, by his or their factor or factors*, shall be commenced and prosecuted within the time appointed and limited by this act for bringing the like suits, and not after, notwithstanding the saving herein before contained, to persons beyond the seas at the times their causes of action accrued."

C. Lee, for the plaintiff. The question is, whether the act of limitations, which had once begun to run, was an impediment removed by the treaty?

This raises another question; did the treaty of peace repeal the laws of the several states which operated as legal impediments to the recovery of British debts, or was an act of each state necessary for that purpose?

It may be conceded without injury to this case, that the act of limitations began to run against this claim before the war—and that the *war* did not suspend its operation, but that it continued to run in the same manner as against a person who is in the country at the time the cause of action accrues, and who goes beyond seas before the limitation is complete—or against a woman who was sole when the cause of action accrued, and who married within the five years.

The plea of limitations can defeat the remedy only. The debt remains. But if the bar had been complete, yet it was forever removed by the treaty.

This was a *bona fide* debt, contracted before the treaty —and the act of limitations is a legal impediment which it is endeavoured to oppose to its recovery. But the

treaty says that the creditor shall meet with no legal impediment; and the constitution of the United States declares the treaty to be the *supreme* law of the land.—The act of limitations, therefore, must yield to the treaty.

In the case of *Ware* v. *Hylton*, 3 *Dal.* 199, this court, upon very solemn argument decided, that the treaty not only repealed all the state laws which operated as impediments, but nullified all acts done, and all rights acquired, under such laws, which tended to obstruct the creditor's right of recovery.

Similar adjudications were also made in the cases of *Hamilton* v. *Eaton*, in 1796, by *Ch. J. Ellsworth* and *Judge Sitgreaves*, in North Carolina. *Page* v. *Pendleton*, in 1793, by Chancellor Wythe, *Wythe's Reports*, 127; and by this court in *The State of Georgia* v. *Brailsford*, 3 *Dal.* 1.

The second article of the convention of 1802, between the United States and Great Britain, *Laws U. S. vol.* 6, *Appendix* 49, was produced by the difference of opinion at the board of commissioners for carrying into effect the sixth article of the treaty of 1794. The ideas of the United States, as to the effect of the treaty in removing all impediments arising from legislative acts, are expressed in the answer to *Cunningham's* claim, in page 51 of the printed report of the proceedings of the board.

The basis of the convention was the American construction of the sixth article of the treaty of 1794. A sum of 600,000l. sterling was stipulated to be paid by the United States for all losses under the sixth article of the treaty of 1794, and the creditors were to recover from their debtors whatever they could in the ordinary course of justice; all legislative impediments having been removed by the treaty of peace, which is recognised and confirmed by the convention.

HOPKIRK v. BELL.

March 4.

The Court ordered the following opinion to be certified to the circuit court:

Upon the question, in this case referred to this court from the circuit court: it is considered by this court, that the said act of limitations is not a bar to the plaintiff's demand on the said note; and this court is of opinion, that the length of time from the giving the note to the commencement of the war, in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States of 1783, does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar: and is also of opinion, that the agent merely for collecting debts, mentioned and described in the said state of facts, is not to be considered as a *factor* within the meaning of the said act of assembly, so as to bring the case within the proviso of said act.

By this the court is not to be understood as giving an opinion on the construction of the note, as to the time of payment.

WILLIAM MALEY v. JARED SHATTUCK.

MALEY v. SHATTUCK.

The commander of a United States ship of war, if he seizes a vessel on the high seas, without *probable cause* is liable to make

ON the 20th of August, 1804, Jared Shattuck exhibited his libel in the district court of the United States, for the district of Pennsylvania, in the following form:*

* As there are so few forms of admiralty proceedings in print, it is hoped that a recital of a considerable part of the record in this case, will be acceptable to the profession; particularly as it is not a libel *in rem*, but for *restitution in value*; for not bringing in the vessel and cargo for adjudication.

To the honourable Richard Peters, Esq. judge of the district court of the United States, in and for the district of Pennsylvania.

The libel of Jared Shattuck, merchant, most respectfully sheweth,

That your libellant, being a subject of his majesty, the king of Denmark, sometime in or about the beginning of the month of May, in the year of our Lord 1800, at St. Thomas, one of his said majesty's West-India islands, loaded a certain schooner or vessel called the Mercator, being an unarmed merchantman, fitted out at St. Thomas aforesaid, for trade only, and being then and there *bona fide* the property of your libellant, with a cargo of merchandise, consisting of provisions, wines, and dry goods, for the sole and *bona fide* account of your libellant, said cargo amounting to 13,920 dollars, or thereabouts, on a voyage to *Jacmel* and *Port-Republican*, in the island of *St. Domingo*, which he consigned to Toussaint Lucas, also a Danish subject, then and there master of the said schooner Mercator, who was instructed by your libellant to dispose of the said cargo at *Jacmel* or *Port-Republican* aforesaid, to the best advantage, for account of your libellant, invest the proceeds in coffee of good quality, and return therewith to the said island of St. Thomas. And your libellant further saith, that on or about the 6th day of the said month of May, the said *Toussaint Lucas* sailed in the said schooner from the said island of St. Thomas, upon the said voyage for *Jacmel* and *Port-Republican*, having on board the said cargo, and also a private adventure belonging to the said *Toussaint Lucas*, together with all such necessary papers and documents, for ascertaining the property and neutrality of the said vessel and her cargo, as are usually carried by vessels belonging to Danish subjects; and proceeded on his said voyage until on or about the 14th day of the said month of May, when, in endeavouring to enter the said port of *Jacmel*, the said schooner Mercator was met with by a certain schooner, called the *Experiment*, a public armed vessel belonging to the government of the United States of America, and commanded by William Maley, a lieutenant in the navy of the said United States, who unlawfully, and in violation of the law of nations, took possession of the said schooner Mercator, and put

restitution in value, with damages and costs, even although the vessel is taken out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon, and hold the original captor liable for the whole loss.

A foreign sentence of condemnation as good prize, is not conclusive evidence, that the legal title to the property was not in a subject of a neutral nation.

MALEY v SHATTUCK.

on board of her a prize-master, and four seamen, who carried the said schooner Mercator, and her cargo, to places unknown to your libellant. And so it is, may it please your honour, that neither the said William Maley, nor any person or persons acting under him, *have brought the said schooner Mercator, or her cargo, to legal adjudication in any court of the United States, having admiralty jurisdiction.*

To the end, therefore, that complete justice may be done to your libellant in the premises, may it please your honour to direct a monition to issue out of this honourable court, directed to said William Maley, Esq. commanding him forthwith *to proceed in due form in this honourable court, against the said schooner Mercator, and her cargo, in order to obtain a legal adjudication of the same in due course of admiralty proceedings, or in default thereof, to appear before your honour, at such time and place as to your honour shall seem fit, to answer your libellant in the premises, and show cause why, by the said honourable court's final sentence and decree, he shall not be adjudged to make restitution in value, and pay to your libellant the whole amount of his loss aforesaid, with full damages and costs*, and that such further justice may be done to your libellant in the premises, as to this honourable court shall ever seem meet, and your libellant shall ever pray, &c.

PETER S. DUPONCEAU, for libellant.

To this libel, Maley appeared,* and filed the protest following:

'To the honourable Richard Peters, Esq. judge of the district court of the United States, in and for the district of Pennsylvania.

The protest of William Maley, Esq. late commander of the schooner Experiment, a public armed vessel of the United States of America, appearing here in court, to avoid all and all manner of contempt, contumacy and

* It does not appear that a monition issued. The *appearance* of Maley seems, by the record, to have been voluntary.

default, under this his protest, against the libel filed by Jared Shattuck, merchant.

This protestant, saving and reserving to himself all, and all manner of exception to the manifest uncertainties, imperfections and insufficiencies, in the said libel contained, and protesting that he ought not, in any wise, to be required to appear thereto, or to proceed against the schooner Mercator, and her cargo, as is therein prayed, nevertheless, for the reasons aforesaid, and as cause why the said libel should be dismissed without further appearance or answer, avers, propounds and says,

That true it is, that the said protestant, while commanding the said schooner Experiment, a public armed vessel of the United States of America, under a lawful commission and authority from the government of the said United States of America, did on or about the 15th day of May, 1800, meet on the high seas, and take possession of the said schooner called the Mercator, in the said libel mentioned, and put on board an officer and four seamen. But this protestant denies, that by so doing, he acted unlawfully and in violation of the law of nations; for he avers, propounds, and says, that since the passing of the act of the said United States of America, entitled, "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," and before the said 15th day of May, 1800, that is to say, on the day of in the year 1799, the said schooner, called the Mercator, being an American registered vessel, owned, hired and employed by a person or persons resident within the said United States, or by citizens thereof, resident elsewhere, sailed and departed from the port of Baltimore, within the said United States, and at the time of her being met and taken possession of by this protestant as aforesaid, and before her return within the said UnitedStates, was proceeding directly, or from some intermediate port or place, to *Jacmel*, a port or place within the island of St. Domingo, within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, she was steering a direct course for the said port of *Jacmel*, and not for Port-au-Prince, whereas, the letter of in-

MALEY v. SHATTUCK.

structions from the said Jared Shattuck, the libellant, and all the other papers exhibited to this protestant, by Toussaint Lucas, the master of the said schooner Mercator, or found on board thereof, falsely, fraudulently, and colourably, represented and declared, among other things, that the said schooner was bound on a voyage from the island of St. Thomas to Port-au-Prince, a place then in the power and possession of the British troops, and not within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, the master thereof appeared to be a *Frenchman* (although this protestant has since heard, but does not admit, that he is an Italian) and the crew consisted chiefly of Portuguese and Italians, nor was there then, nor at any time before or since, exhibited to this protestant, any burgher's brief or briefs, or other evidence whatsoever, that the said master, or crew, or any part thereof, had become burghers of the said island of St. Thomas, or were otherwise naturalized subjects of the king of Denmark, without which this protestant avers, that the said master and crew could not lawfully command and navigate a Danish vessel, according to the laws and usages of Denmark. And this protestant further avers, propounds, and says, that the said Jared Shattuck, the libellant, alleging himself to be the owner of the said schooner Mercator and her cargo, and to be a burgher of the island of St. Thomas, (neither of which allegations is admitted by this protestant) was born in the state of Connecticut, one of the United States aforesaid, nor did it satisfactorily appear to this protestant, (considering the many other proofs and causes of suspicion to the contrary) at the time of his meeting and taking possession of the said schooner Mercator, as aforesaid, nor has it so appeared at any time since, that the said Jared Shattuck, the libellant, had, by any lawful act of expatriation, or otherwise, at any time, become a subject or citizen of any other government or nation, and ceased to be a citizen of the said United States, owing fidelity and allegiance thereunto; but admitting it to be true, that the said Jared Shattuck, the libellant, was an inhabitant of the said island of St. Thomas, this protestant did then, and does still, verily believe, that the said Jared Shattuck had repaired to the

said island of St. Thomas, or remained there, for the purpose of carrying on an illicit and clandestine commerce with ports and places within the territory and dependencies of the French republic, during the hostilities which were then waged between the United States and the French republic, and also between the king of Great Britain and the said French republic. And this protestant further avers, propounds, and says, that believing, from all the appearances, circumstances, and reasonable and just causes of suspicion, herein before averred and propounded, touching the original American character of the said schooner Mercator, the voyage on which she was actually proceeding, the false destination declared and represented in the said letter of instructions, and other papers exhibited and found on board, the description of the master and crew, and the birth-place and original allegiance of the said Jared Shattuck, the libellant, that the said schooner Mercator, was a registered vessel of the said United States, voluntarily carried or suffered to proceed to a French port or place as aforesaid, and to be employed as aforesaid, contrary to the intent, and in defiance of the prohibitions of the said act of the congress of the United States, entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof." This protestant, in obedience to the said act of congress, and to his official instructions, took possession of the said schooner as aforesaid, with a view to such further examination and proceedings as the law of nations, and the laws of the United States, should warrant, justify, and require. But this protestant avers that such possession was taken lawfully, upon the just and reasonable causes, motives, and designs, aforesaid, and with the utmost care, caution, and solicitude, that the said schooner Mercator and her cargo, should thereby suffer no injury, damage, or spoliation; and that the real national character, and the real commercial objects of the said schooner Mercator, of her pretended owner, and of the said master and crew, while prosecuting her said voyage, should be more fully examined, and satisfactorily ascertained, without any unnecessary detention or delay, this protestant, at the time of placing on board of the said schooner Mercator, an officer and four seamen, as aforesaid, did not remove, nor take therefrom, the said master and crew of the said schooner Mercator, or any of

MALEY v SHATTUCK.

them, nor remove, take away, cancel, or destroy, any of the papers and documents of said schooner Mercator, and her cargo, but ordered the officer, so put on board of the said schooner, having on board her said master and crew, and all the documents and papers of the said schooner and cargo, to make the best of his way to Cape Francois, there to deliver all his letters to Silas Talbot, Esq. then commodore and commander of the public vessels of the said United States, upon that station, and to wait the orders of the said Silas Talbot, with express instructions, also, to pay particular attention to every thing belonging to the said schooner Mercator, and her cargo, seeing that nothing should go to waste, and to deliver the said schooner to the said master thereof, if the said Silas Talbot, commodore and commander as aforesaid, should clear her. And this respondent further avers, propounds, and says, that in a short time, not exceeding the space of six hours, or thereabouts, after the said schooner Mercator had parted from the said schooner *Experiment*, destined for Cape Francois as aforesaid, under the orders aforesaid, the said schooner Mercator was captured on the high seas, as prize, by a British private armed vessel of war, called the *General Simcoe*, commanded by Joseph Duval, who thereupon forcibly took the said schooner Mercator and her cargo, from and out of the possession, care, custody and controul, as well of the said master and crew, of the said schooner Mercator, as of the said officer and men who had been put on board of her, as aforesaid, by this protestant, and who were, thereupon, taken out of and removed from the said schooner Mercator, into, and on board of the said British privateer, and he said schooner Mercator and her cargo, sent to the island of Jamaica, under the charge of a prize master and men belonging to the said British privateer, without the assent, connivance, assistance, negligence, or fault, whatsoever, of this protestant, or of the officer and men whom he had put on board of the said schooner Mercator, as aforesaid, for the causes and with the intentions, aforesaid. And this protestant further avers, propounds, and says, that the said schooner Mercator and cargo, being so, as aforesaid, captured on the high seas, as prize, and sent to the said island of Jamaica, by the said British privateer, a libel, in due form of law was exhibited and filed by the said captors, in the court of vice-admiralty, lawfully established in the said

island of Jamaica, (being a court of competent jurisdiction in all matters of prize) alleging, and charging, that the said schooner Mercator and cargo, were the property of France, or of the king of Spain, or of some person or persons being subjects of France, or of the king of Spain, or inhabiting within some of the territories of France, or of the king of Spain, and were good and lawful prize, inasmuch as hostility and war then notoriously subsisted between the king of Great Britain, on the one part, and the said French republic and the king of Spain, on the other part; and thereupon the said captors, in their said libel, prayed that the said schooner Mercator and her cargo, might be adjudged lawful prize, and be confiscated and condemned. And this protestant further avers, propounds, and says, that, notwithstanding the denial of the said Jared Shattuck, in his said libel contained, he, the said Jared Shattuck, received speedy and full notice, that the said schooner Mercator, and her cargo, were captured as prize, and sent into the said island of Jamaica, as aforesaid, and there prosecuted by the said captors as prize, in manner aforesaid; and, thereupon, a claim was exhibited, and a defence made, by and for the said Jared Shattuck, the alleged owner of the said schooner Mercator and her cargo. And upon hearing of the parties, by their respective advocates, and upon examining all the ship's papers and documents, together with other evidence and proofs in the cause, the judge of the said court of vice-admiralty, was pleased to adjudge and decree, that the said schooner Mercator, and her general cargo, were good and lawful prize, and did therefore adjudge, order, and decree, that the same be condemned and confiscated to the use of the said captors, &c. From which sentence, the said Jared Shattuck, the libellant, prayed leave to appeal, which was granted. But this protestant avers, that this appeal has not been duly prosecuted by the said Jared Shattuck, but has been altogether waived and abandoned.

And this protestant further avers, &c. that at the time of the capture of the said schooner and cargo, by the British privateer, as aforesaid, and at the time of the libel and of the condemnation, and of the appeal, as aforesaid, peace and amity notoriously subsisted between the United States of America, and the king of Great Britain and the king of Denmark; and also be-

MALEY v. SHATTUCK.

tween the said king of Great Britain and the said king of Denmark, and their respective citizens and subjects: and, therefore, this protestant avers, that if the allegations contained in the libel of the said Jared Shattuck, had been true, sentence of condemnation and confiscation, as prize, could not, and would not, have been pronounced, as aforesaid, against the said schooner Mercator and her cargo, by the said court of vice-admiralty, having competent jurisdiction upon all matters of prize, as aforesaid, and therein proceeding according to the law of nations and the faith of treaties.

Wherefore, this protestant prays that the said libel may be dismissed with costs, &c.

A. J. DALLAS, for the protestant.

The replication of Shattuck, was as follows:

To the honourable Richard Peters, Esq. judge of the district court of the United States, in and for the district of Pennsylvania.

In the case of the schooner Mercator, and her cargo, *Toussaint Lucas*, master.

The replication of Jared Shattuck, late owner of the said schooner Mercator, and her cargo, to the protest of William Maley, Esq. late commander of the public armed schooner of the United States Experiment.

This replicant, not confessing or acknowledging any of the facts, matters, and things, by the said William Maley, in and by his said protest set forth, propounded and alleged, and also saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said protest contained, and to the informality thereof, and *protesting on his part*, that the said William Maley ought to have appeared absolutely, and not under protest, and made direct answer, *upon oath* or affirmation, to the charges in this replicant's libel contained, or to so much thereof as he has been advised to be material for him to reply unto: Doth aver, allege, propound and say, that this replicant was born in the

state of Connecticut, in the year 1774, and when he was between fifteen and sixteen years of age, viz. about the end of 1789 or beginning of 1790, the United States being then at peace with all the world, he migrated to the island of St. Thomas, one of the dominions of the king of Denmark and Norway, with a view to settle and establish his permanent residence in that island. That he served his apprenticeship there, with a mercantile house, for about six years, and from his first arrival, has constantly and permanently resided, and now continues to reside there. That on the 10th of April, 1797, the United States being still at peace with all the world, he became a naturalized Danish subject, and burgher of the said island, and shortly afterwards, intermarried with an inhabitant of that place, by whom he has several children, all living in that island. That he did acquire, and now holds real estate there, and is there permanently settled and established, and carries on the trade and business of a merchant.

The replication then goes on to deny, that he went or remained there for the purpose of illicit trade. It avers, that during the war between France and Great Britain, which terminated by the treaty of Amiens, he was largely concerned in trade, at and from St. Thomas to foreign ports, and had a number of vessels navigating under the Danish flag in the West-India seas. That several of his vessels were taken, as well by British as French cruisers, carried into their respective islands, and there acquitted, and his neutral character, and that of his property, was acknowledged by the tribunals of both nations.

That in May, 1800, he loaded the Mercator, as mentioned in his libel, and sent her on a voyage to St. Domingo, consigned to the said Toussaint Lucas, who was also a *bona fide* subject. That the original destination of the vessel was for Port-au-Prince, *alias* Port Republican, a place then in the power, and under the dominion of the negro general Toussaint, not of the British troops, as stated in Maley's protest. That at that time commerce was lawfully carried on between the United States and ports of St. Domingo, which were in the power of general Toussaint. That on the 3d of May, 1800, he gave

MALEY v. SHATTUCK.

written instructions to Lucas, to proceed with his vessel to Port-au-Prince, but as she was ready to sail, he was informed that the forces of general Toussaint had taken Jacmel from general Rigaud, who held for the French republic. That Jacmel is a port of the island of St. Domingo, which lies between the island of St. Thomas and Port-au-Prince, and is in the way between the former and the latter. That the distance from Jacmel to Port-au-Prince, is by land only between thirty and forty miles, but by sea upwards of one hundred leagues. That conceiving it to be advantageous to try the market at Jacmel, before proceeding to Port-au-Prince, he gave verbal directions to Lucas for that purpose.

It denies that any thing false or colourable was intended, and that any of the Mercator's papers were false or colourable, and that he gave any orders to Lucas to deny or conceal his intention of going into Jacmel.

It admits, that after the passage of the act of congress, "*further to suspend*," &c. and before the 15th of May, 1800, the Mercator was an American registered vessel, owned by a citizen of the United States, and sailed from Baltimore, but denies, that when taken by Maley, she was navigating contrary to the laws of the United States.

It avers, that on the 26th of November, 1799, he purchased her *bona fide* at St. Thomas, for the sum of 8,500 dollars, which he had actually paid and took a bill of sale, which was on board at the time of her capture. That from the day of purchase until her capture, he was *bona fide* the sole owner, and that no other person had any interest in her or her cargo. That almost the whole shipping of the island of St. Thomas, consists of vessels built in the United States and in the island of Bermuda, and brought to the former island for sale.

That at the time of her capture, the Mercator was navigated as a *bona fide* Danish vessel, and had on board every paper and document which the law required to prove her neutrality; and especially that she had, 1st. The king's passport, in the usual form. 2d. The certificate of measurement. 3d. Her muster-roll, or official list of her crew. 4th. The bill of sale. 5th. The burgher's

brief of her captain, Toussaint Lucas. 6th. Her clearance. 7th. The invoice and bill of lading of her cargo duly attested, as to the ownership and neutrality thereof. 8th. The captain's instructions or sailing orders; and 9th. A certificate, upon oath, of several respectable merchants of the island, attesting the fact of Shattuck's citizenship and residence in the island. That the crew consisted of eleven persons, viz. the master, the mate, seven seamen, the cook and a boy, who were all by birth Italian or Portuguese. That the master was a native of Leghorn, in Tuscany, was a Danish subject, and had resided seven years in St. Thomas. That very few Danish seamen are to be had in the Danish islands; and that, except the officers of government, there are very few Danes in the islands of St. Thomas and St. Croix, the inhabitants being chiefly native English and Americans, with some French and other foreigners.

It denies, that by the laws of Denmark, a vessel cannot be lawfully navigated by others than Danish or naturalized Danish sailors, and avers, that the crew may be subjects of any nation whatever, provided that in time of war, not more than one-third thereof be native subjects of one or other of the belligerent powers. It denies that any of the crew of the Mercator were subjects of any of the belligerent nations; and that at the time of her capture, there was any reasonable cause of suspicion that she was an American vessel carrying on an illicit trade. It submits to the court, whether Maley had a right, by the law of nations, to arrest a vessel on the high seas, sailing under the protection of his Danish majesty's royal passport, under pretence of a violation of a municipal law of the United States.

It suggests that Maley acted *mala fide*, and offers to prove that he was in the habit of violating the law of nations, and the instructions of his government, with respect to neutral vessels and property, and that he was dismissed from the service of the United States, principally on that account.

With respect to the capture by the British privateer, it admits that the Mercator was so captured, while under the protection of the United States, and their national

MALEY v. SHATTUCK.

flag, but does not admit that it was without the connivance or fault of Maley, or the officer whom he put on board. It admits the condemnation as prize, but avers that it was the duty of the officer and men to have resisted the capture, and to have demanded of the court of vice-admiralty, at Jamaica, restitution of the vessel and cargo, on the ground, that the same had been unlawfully, and in violation of the respect due to the national vessels of the United States, and to the flag thereof, taken from the possession, and from under the protection of the commander of one of the public vessels of war of the United States.

It admits that Lucas filed a claim for the vessel and cargo, before the vice-admiralty court at Jamaica, and that they were condemned as prize, but alleges that the sentence of condemnation was contrary to the evidence. It admits also, that an appeal was entered, and exhibits an exemplification of the proceedings. It denies that Lucas was bound to exhibit a claim, or to appeal from the condemnation, and that Shattuck was bound to prosecute the appeal, but avers that the whole should have been done by or in behalf of the United States, to whom alone the vessel and cargo would legally have been restored, as having been taken from their possession, and from under their protection.

It avers that Shattuck, as soon as he received notice of the capture and condemnation, gave information thereof to the governor-general of the Danish West-India islands, and to Richard Soderstrom, charged with the consular functions for the king of Denmark, in the United States, who communicated the information, without loss of time, to the government of the United States, and claimed reparation. That the government of the United States expressed a wish, that the appeal should be prosecuted, in compliance with which, Shattuck, without delay, forwarded the necessary papers to England; but when they arrived, he was informed by his proctors that it was useless to prosecute the appeal, because the prize-money had been distributed, and the prize agent had died insolvent.

It denies that the vessel and cargo would not have been condemned if they had been really and *bona fide* neutral property, and avers, that they really were such as stated in his libel, and does not admit that he is precluded by the sentence of the court of vice-admiralty of Jamaica, from showing the same.

It concludes, "that for aught that has been said and alleged by the said William Maley, in his protest aforesaid, this replicant ought not to be precluded from obtaining the benefit of the prayer of his said libel; he therefore prays, that the said William Maley may, by the interlocutory decree of this honourable court, be ordered to appear *absolutely*, and *without protest*, before your honour, so that further justice may be done by this honourable court in the premises, as to right shall appertain."

(Signed) JARED SHATTUCK.

Jared Shattuck being duly sworn according to law, on his oath doth say, that all and singular the facts, matters and things, by him in the foregoing replication stated, as far as they relate to his own acts, and matters within his own knowledge, are true; and inasmuch as the same relate to the acts of others, he verily believes them to be true.

(Signed) JARED SHATTUCK.

Sworn before me the 26th of May, 1804.

(Signed) RICHARD PETERS.

The rejoinder of Maley was as follows:

This rejoinant saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said replication contained, and not confessing or acknowledging any of the facts, matters and things by the said Jared Shattuck in and by his said replication set forth and alleged, but denying the same, saith, that the facts in this rejoinant's protest set forth, are true and sufficient to excuse him

MALEY v. SHATTUCK.

from further appearance and answer to the libel of the said Jared Shattuck.

(Signed)

A. J. DALLAS, for WILLIAM MALEY.

Whereupon it was adjudged, ordered and decreed, that the libel be dismissed with costs.

From which decree Shattuck appealed to the circuit court.

Upon the appeal, the circuit court* being of opinion that the appellant was entitled to restitution, with damages and costs, reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely without protest, before the district court; to whom the cause was remitted for further proceedings.

In the district court, upon the remission of the cause, the following entry was made:

And now, to wit, this 9th day of August, 1805, the said William Maley, by Alexander James Dallas, his proctor aforesaid, having appeared absolutely as aforesaid, comes here into court, and for answer to the libel of the said Jared Shattuck, propounds and says, that the facts by this respondent in his said protest set forth are true, and to the intent that justice may be done in the premises, this respondent prays that the said Jared Shattuck may be called upon to declare, on his solemn oath, to whom and when, and in what manner, he paid for the said vessel called the Mercator, and whether the original American owner hath any interest therein, or in the restitution in value, by the said libel prayed for; and whether any correspondence, and what, took place between the said Jared Shattuck, and the captain of the said vessel, or any other person, after she was carried into Jamaica; and whether any correspondence,

* Holden by Judge Washington, in May, 1805.

and what, took place between the said Jared Shattuck and any persons, and whom, relative to the prosecution of an appeal from the decree of condemnation in Jamaica; and whether the said Jared Shattuck made any, and what application, and when, to the American government, relative to the capture of the said vessel by this respondent, as aforesaid, &c.

A. J. DALLAS, for respondent.

And thereupon the said Jared Shattuck, under all legal protestations and reservations, for replication to the answer of William Maley, above-mentioned, saith, that all and singular the facts, matters and things by him this replicant in his libel, and in his replication to the answer under protest of the said William Maley, filed in this honourable court, are true. Without this, that the facts by the said respondent, in his said answer under protest set forth, are true.

He therefore humbly prays, that this honourable court, by its final decree in this cause, will be pleased to order, adjudge and decree, that the said defendant, William Maley, make restitution to this replicant of the value of the schooner Mercator, her rigging, tackle, apparel, &c. and of her cargo, at the time of her capture by the United States armed schooner Experiment, under the command of the said respondent; and that the said respondent pay to the said replicant the amount of the damages by him suffered, by reason and in consequence of the capture and loss of the said schooner Mercator, and her cargo; the said value and damages to be inquired of, estimated and reported, to this honourable court by the clerk, taking to his assistance two merchants, in the usual form; and that the said respondent pay the costs of this suit, &c.

PETER S. DUPONCEAU, proctor for libellant.

The clerk having returned an estimate of the value and damages, amounting to 41,658 dollars and 67 cents, Maley filed the following exceptions to that report.

1. That the respondent is charged with the expense of papers and outfits, advances to mariners, provisions and stores for the voyage, and labour of sailors before the shipping.

2. With the certificate of neutrality of property, duties at St. Thomas, commission on shipping the cargo, and insurance, without proof that any insurance was actually paid.

3. With expenses at Jamaica, and for copies of the proceedings in the court of admiralty, and of the appeal papers.

4. With expenses of Mr. Soderstrom.

5. With too much interest.

6. That there was no proof of the actual price of the schooner other than the bill of sale on board.

7. That there was no proof of the value of the cargo other than the invoice on board.

In the district court, judgment was entered by consent in favour of the libellant, for the amount reported by the clerk, saving all exceptions upon the appeal.

In the circuit court, the following answer of Shattuck to the exceptions to the report of the clerk was filed:

To the first exception he answers: that these expenditures of outfits, &c. made after the purchase, and after the sailing of the vessel, increased the value thereof, and are properly charged as a part of the said value.

The same were allowed in the case of the Charming Betsey—confirmed by a decree of this court (the circuit court) and not appealed from.

2d. To the second exception he answers:

1. As to the insurance, that it is a regular mercantile charge, the owner being considered as his own insurer. That it is generally admitted in mercantile accounts. That it is peculiarly admissible in the case of an *unjust* capture, like the present, however it might be in a case of lawful capture, or capture with sufficient probable cause.

2. The commission on shipping is also a regular mercantile charge; the said commission, the duties of exportation paid at St. Thomas, and the certificate of neutrality, would have been charged on the goods, had the vessel arrived at the port of her destination. The present being a case of unjust capture, the respondent conceives that the commissioners would have been justified in allowing to him *all the loss of possible profit*, and to have taken into view the profit which he could have made, had the vessel arrived at the port of her destination, whereas they have only indemnified him for his actual losses, and he conceives that he ought not to be debarred from any part of his said indemnity.

3d. To the third and fourth exceptions he answers, that the said expenses are reasonable, and the like were allowed and confirmed in the case of the Charming Betsey.

4th. To the fifth he answers, that the interest is not overcharged.

5th. To the sixth and seventh he answers, that the evidence of the papers found on board, is sufficient in law, in prize causes, unless contradicted by other evidence. That it is confirmed in this case by the oath of the party, contained in the pleadings in this cause.—And as to the ship, is again confirmed by the oath of the same party, taken a second time on special interrogatories of the appellant, William Maley.

The answer of Shattuck, upon oath, to the several interrogatories contained in the answer of Maley to the libel, stated, that he purchased the schooner Mercator at St. Thomas, on the 26th of November, 1799, of one John Liddel, of Baltimore, for the sum of 8,500 dol-

MALEY v. SHATTUCK.

lars, which, at the time of purchase, he actually and *bona fide* paid to the said John Liddel, in Spanish milled dollars. That the original owner has not at present, nor has had at any time since the purchase thereof by the respondent, directly or indirectly, by way of trust, cover, or otherwise, any interest therein, nor in the restitution in value, or damages prayed for in the libel.

That to the best of his recollection, the said schooner was taken by the British privateer on the 15th of May, 1800, was carried into and arrived at Jamaica, and libelled on the 23d of the same month, and condemned as lawful prize on the 28th of June following. That the respondent was informed of the capture by a letter from Lucas, and that Dick, M'Call & Co. had taken the necessary steps to defend the property. That he was informed afterwards, by the arrival of a Mr. Grigg, in the beginning of August, 1800, that the schooner was condemned, and that an appeal had been entered. That the respondent had no opportunity of writing to Lucas during the trial. That immediately upon receiving notice of the condemnation, he applied to the commandant general of the Danish West-India islands to use his endeavours to obtain reparation from the American government, to which he received an answer, (which is lost) together with a letter for the secretary of state of the United States, which he forwarded.

That being advised that the United States were the proper party to prosecute the appeal, and fearing that his further interference might prove prejudicial to his interest, he did not prosecute the appeal until he received from Mr. Soderstrom a copy of a letter from the secretary of state of the United States to him, dated the 26th of November, 1800, by which he understood that the government of the United States wished him to prosecute his appeal, in consequence of which, he wrote for that purpose to his correspondents in London, by whom he was informed that they had taken the necessary steps to procure a reversal of the decree of condemnation; but that in the mean time the proceeds of the sales of the prize had been paid to the *prize captain*, who had died insolvent, so that no redress was finally had.

On the 29th of January, 1806, the circuit court affirmed the sentence of the district court, except as to the first and second items in the report of the clerk, and decreed restitution of the value and damages, amounting to 33,244 dollars 67 cents, and costs.

From this sentence Maley appealed to this court.

The libellant also appealed as to so much of the sentence as disallowed those two items of the clerk's report.

Breckenridge, *attorney general*, for the *appellant*, and *Harper*, *Key*, and *Martin*, for the *appellee*.

Argument for the appellant.

Two grounds were taken by the attorney general:

1st. That Maley had committed no act *mala fide*, but was in the performance of an authorised public duty, and was therefore justified.

2d. That the claim to reparation is without merit, and without law.

1. The act being done in the execution of a public duty, cannot, in our courts, be considered as done *mala fide*.

It was the policy of the times to prevent our citizens, whether resident here or abroad, from trading directly or indirectly with the French; and that policy ought to be kept in view when the several acts of congress on this subject are under consideration. These acts are in *vol. 4, p.* 129, *June 13th*, 1798, and *p.* 244, *9th Feb.* 1799, and *vol. 5*, *p.* 15, *27th Feb.* 1800. These laws being all in *pari materia*, are to be taken into one view, and although some of them had expired, yet it is proper that they should be considered when deciding upon the construction of subsequent statutes on the same subject.

All the acts went successively to cut off the intercourse *more effectually*. The fifth section of the act of Febru-

MALEY v. SHATTUCK.

ary, 1799, authorises the President to give *instructions* to the commanders of the public armed ships to *stop*, *examine*, and *send in* ships suspected—*vol.* 4, *p.* 247. This was going a step further than the act of June, 1798, which did not authorise any such instructions.

The act of *Feb.* 1800, (*vol.* 5. *p.* 15) goes further still, and extends the prohibition of intercourse to citizens of the United States residing abroad; and expressly prohibits the island of *Hispaniola*, excepting such ports as should be excepted by the proclamation of the President.

Under the act of 1799, the President caused the instructions*-of 12th of March, 1799, to be issued to the commanders of the public armed vessels of the United States, by which their attention was particularly called to the practice of covering the illicit trade under the *Danish* flag. The direction not to injure or harrass the fair neutral commerce, implies a right to stop and examine; and if, upon such examination, they should have reasonable cause to suspect that the vessel was engaged in violating the law, the instructions, as well as the law, required them to seize and send her in for adjudication. There was, therefore, a clear right (at least a right which our courts cannot deny) to detain the vessel a reasonable time for examination, and if it was a doubtful case, to send her for further examination to the commanding officer on that station.

That there was probable cause sufficient to justify such a measure, (however it might be in a case of actual seizure, and sending in for adjudication) can scarcely be doubted.

1. Shattuck was a native American citizen, resident in a place suspected by our government. The certificate of the merchants of St. Thomas, respecting his burgher-ship, naturally led to suspicion. It appears, by the letters in the record, that although his neutrality had been respected in Tortola, yet it had not been respected in Jamaica.

* See these instructions at length, cited in the case of *Barreme* v. *Little*, 2 *Cranch*, 171.

2. The vessel was known to have been built in the United States, and to have lately belonged to American citizens. She had sailed from Baltimore after the passing of the act of congress.

3. The ship's papers showed her destination to be to *Port-au-Prince*, a place not prohibited; but she was stopped as she was entering *Jacmel*, a forbidden port.

An attempt is made to account for this, by verbal orders, but there is no proof of them; and it does not appear that Lieut. Maley was informed of such orders, at the time of the detention, nor of the fact that *Toussaint* had possession of the place.

But if Maley had known of the verbal orders, the reason assigned by Shattuck for those orders, was, in itself, a strong ground of suspicion. The reason was, that he had heard that *Toussaint* had possession of *Jacmel*. If the vessel and cargo were *bona fide* Danish property, he might, with equal safety, have traded there while the place was in possession of *Rigaud*, as while in that of *Toussaint*. The reason could only apply to *American* property, upon the presumption that the United States would take off the prohibition, when it should be known that *Jacmel* was no longer under the acknowledged jurisdiction of *France*.

4. All the material papers were not produced. The master did not produce his burgher's brief, showing him to be a Danish subject; and a Danish vessel cannot lawfully sail, but under a Danish master.

The attestation of his burgher's brief, is dated long after the vessel was stopped.

It must be remembered, that Maley did not *seize* the vessel, as a prize, or as a forfeiture, but only *detained* her for further examination. The question, therefore, is not whether there was probable cause of *seizure*, but probable cause for *further examination*.

The master was not dispossessed of his vessel; none of the crew were taken out; her papers were not removed; no violence or outrage was committed. But

MALEY v. SHATTUCK.

while detained for further examination, the vessel was seized by a stronger hand and carried away by a superior force.

If it be objected that no resistance was made; it is answered that none could be made. The vessel was not armed; and the officer was bound by his instructions, to permit the right of search by all the belligerents except France.

If it be said, that Maley ought to have claimed the vessel, in Jamaica—the answer is, that he had no right to seize, unless it was really an American vessel. If she was a fair neutral, Shattuck's claim must prevail.

If she was an American vessel she would not be condemned; if she was any thing else, he was not interested.

Maley's possession, therefore, was lawful and *bona fide*. If a loss has happened, it has been produced by the *vis major* of another, to whom the injured party ought to look for reparation, 4 *Rob.* 284. Maley's possession being *bona fide*, he cannot be answerable for the *mala fide* act of another.

He detained the vessel only *six hours*; and she was sailing towards *Port-au-Prince*, the ostensible place of her destination, when captured by the British ship of war.

Even if Maley was mistaken, but acted with good faith, he is not answerable for the loss. 1 *Rob.* 18. *Betsey.*

That was an American ship and cargo, taken by the *English*, at the capture of *Guadaloupe*, in April 1794; and *retaken* by the *French*, in June following. The American claimants libelled the *English* captors for restitution *in value*. The captors defended themselves by an allegation that the ship had broken the blockade.

Sir William Scott, after deciding that there was no defence, on the ground of breach of blockade, stated the question to be, whether the original captors were exonerated of their responsibility to the American claimants.

"It is to be observed," says he "that at the time of recapture, *America* was a neutral country, and in amity with *France*. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal *bonæ fidei* possession? And, 2d, whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal? For on both these points the law is clear, *that a bona fide possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning.* This is the law, not of this court only, but of *all* courts, and *one of the first principles of universal jurisprudence.*"

He then notices two cases very much in point. "*The Nicholas and Jan* was one of several *Dutch* ships taken at *St. Eustatius*, and sent *home*, under convoy, to *England*, for adjudication. In the mouth of the channel they were retaken by the *French* fleet. There was much *neutral property* on board, *sufficiently documented*," and a demand of restitution, in value, was made by the neutral owners, on the first captors. One of the grounds of the demand was, that the captors had *wilfully* exposed the property to danger, by bringing it home when they might have resorted to the admiralty courts, in the West-Indies; but on this point the court was of opinion, that under all the circumstances, they had not exceeded the discretion necessarily entrusted to them by the nature of their command.

It was also urged against the *claimants* in that case, that since the property had been retaken by their *allies*, they had a right to demand restitution *in specie* from them; and on those grounds the English courts rejected their claims.

The other case which he cites, *The Hendrick and Jacob*, is still more like the present. A *Hamburghese* ship was *erroneously* taken as *Dutch*, and *retaken* by a *French* privateer, and was *lost* going into *Nantz*.

MALEY v. SHATTUCK.

On demand for restitution, against the *British* captor, the lords of appeal decided, that as it was a seizure made on *unjustifiable* grounds, the owners were entitled to restitution from *some* quarter; that as the *French* recaptor had a justifiable possession, under *prize* taken from *his enemy*, he was not responsible for the accident that had befallen the property in his hands. That if the property had been *saved indeed*, the claimant must have looked for redress to the justice of his ally, the *French*; but since that claim was absolutely extinguished, *by the loss of the goods*, the proprietor was entitled to indemnification from the original captor.

After citing these authorities, Sir W. Scott inquires, whether, in the case then before him, the original seizure was so wrongful, as to induce that strict responsibility, which attaches to a tortious and unjustifiable possession.

He then states some grounds of suspicion which might have appeared to the captors, as to the fairness of the neutrality, and proceeds to inquire whether any conduct of the captors, after the first seizure, had rendered them liable to the *strictest* responsibility. "On this point," says he, "I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would *justly* prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the *British* captor for indemnification; but till this is proved, *the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors.*" In the conclusion of his opinion he says, "if the neutral has sustained any injury, it proceeds not from the *British*, but from the *French*; and there is no reason that *British* captors should pay for *French* injustice."

So we say in our case, there is no reason that the American officer, who merely stopped the vessel for examination, should pay for British injustice.

2. That the claim to reparation is without merit, and without law.

Shattuck was himself the cause of the suspicious circumstances which led to the detention of the vessel by Maley, who would have been guilty of a neglect of duty, and disobedience of orders, if he had done otherwise than he did. There was no improper conduct on his behalf, and the whole detention was only six hours. The British were bound to restore the vessel and cargo without salvage, and with damages and costs, if it was really the property of a neutral, and this would have been done, without doubt, if Shattuck had prosecuted his appeal, and been able to prove his property. But having acquiesced in the decree of condemnation as enemy-property, he can never deny the fact. It is conclusive evidence against him. If not conclusive, it is still evidence of probable cause of suspicion. Upon the evidence which caused Maley to *suspect*, the court of admiralty *condemned*. This is surely sufficient to justify his detention of *six hours* for examination.

Argument for the appellee. Unless the taking was lawful, or with probable cause, the captor is liable for all the loss. This principle is admitted by the argument for the appellant. The case of the *Charming Betsey*, 2 *Cranch*, 64, was stronger in favour of captain Murray than this is in favour of lieutenant Maley; and yet, in that case, this court decided that captain Murray was a trespasser, and liable for damages and costs.

It is no answer to say, that the loss does not appear to have been the consequence of Maley's act. If the taking was unlawful, he is liable at all events. It is like the case of deviation, which throws the loss upon the assured, although the loss was not the consequence of the deviation. It is sufficient if it exposed the property in any manner to a liability to danger. But here it is evident that the loss would not have happened, if the vessel had not been detained. She was within an hour's sail of Jacmel, and would have gone in with safety.

MALEY v. SHATTUCK.

Two questions present themselves for consideration.

1st. Was the capture lawful? and,

2d. Was there probable cause?

A third question may also arise, whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted to by the counsel for Maley.

1. The first question is, whether the capture was lawful? On this point the case of the *Charming Betsey* is conclusive. It was there decided by this court,

1st. That the *non-intercourse law* did not extend to vessels built in the United States, and *bona fide* sold before the act of trading. In the present case the vessel was sold before the existence of the act under which her seizure is now attempted to be justified.

2d. That the sale must appear to be made with intent to evade the law.

3d. That a native citizen of the United States may so far change his national character, as to take him out of the operation of that act. The present appellee is the same person whose property was in contest in that case; and although that fact does not appear on this record, yet it appears that he is a person in exactly the same circumstances.

But the sentence of the vice-admiralty court in Jamaica, is said to be conclusive evidence against Shattuck.

But the sentence is only conclusive evidence that she was *good prize* to the British. It does not state for what cause. It contains no direct reference to the libel, or other parts of the proceedings. If it refers to the libel, the property is there stated to be *French* or *Spanish*, or to belong to some other enemy of Great-Britain. If you look into the proof exhibited in that court, it shows it clearly to be the property of Shattuck.

At all events, neither the record, nor the proceedings in Jamaica, show it to be *American property, violating the laws of the United States*, which is the only case that could justify the capture by Maley. If it was *Spanish* property, he had no right to touch it. If it was a *French* vessel, unless *armed*, he had no right to seize it. So that if the sentence is conclusive evidence, it is as conclusive against Maley as it is against Shattuck.

But it is said he ought to have prosecuted his appeal; and, not having done so, he has been guilty of negligence. So far from this is the truth, that he was not bound to resort at all to the British captors. It was the duty of Maley, or the United States, to resort to them. *His* remedy was against Maley. He was not bound to look further. It can be no ground of a charge of negligence to say, that he has done more than he was bound to do.

2. Was there probable cause?

On this point too the case of the *Charming Betsey* is conclusive. The grounds of suspicion in this case are not so strong as they were in that.

But probable cause is no ground on which to deny restitution of the thing itself, or its value. It only excuses from damages for the *tort*. It is no bar to a reimbursement of actual loss. Shattuck asks only for restitution and expenses; and this is the least that a friendly nation ought to give.

3. As to the items in the statement of the value, and expenses, which have been excepted against.

All the outfits of the vessel, and expenses of shipping the cargo, together with the outward duties, in addition to the first cost, constituted the value of the vessel and cargo, at the time of seizure, and ought to be allowed. The premium of insurance also was a proper charge. For, although no insurance was actually made, yet Shattuck was to be considered in the light of his own insurer, and the risk was worth the premium.

MALEY v. SHATTUCK.

There is evidence in the record that it is a customary charge in such cases.

Argument, in reply. This case is not like that of the *Charming Betsey*. In that case the loss was produced by *captain Murray's own act.* But in this, the loss is not the immediate effect of the act of Maley, but of the commander of the British privateer, who is liable to Shattuck for the injury he has sustained. To convert an originally lawful act into a trespass, by subsequent misconduct, that misconduct must proceed from the *party himself*, and not from the act of *another*, whose conduct he cannot controul.

In the case of the *Charming Betsey*, the court decided in express terms, that "*her papers were perfectly correct.*" In the present case, some of the papers were false and delusive, and others were not shown, or were not found.

The sentence in Jamaica is conclusive evidence that the property was not *neutral Danish property*, which is the very ground of the present libel. Unless, therefore, the admiralty court of one nation can reverse the sentence of an admiralty court of another nation, that sentence in Jamaica is conclusive against Shattuck's title. If he had prosecuted his appeal, and reversed the sentence, he would have obtained indemnification. By his instructions from his government, Maley was bound to act on *reasonable suspicion*. They gave him notice of the practice of covering this illicit trade with the *Danish* flag. When, therefore, he found a recent sale of an American vessel to a person pretending to have become a Danish subject, and residing in a place notorious for its abuse of its neutral flag—when he found the vessel attempting to enter a prohibited port, with an ostensible destination to a port not prohibited—when no evidence was exhibited to show that the master of that vessel was a Danish subject—and when his instructions required him "*to be vigilant*, that vessels really American, but *covered* by *Danish* papers, and bound to or from French ports, do not escape

you," how is it possible to say that he had not "*reason to suspect?*"

Although any one of these circumstances alone might not afford "*reason to suspect*," yet the combination of the whole certainly did.

With respect to the claim of *insurance*, the case of the *Charming Betsey* is full in point. It is admitted that no insurance has been paid. And the court in that case expressly said, that "a public officer, entrusted on the high seas, to perform a duty deemed necessary by his country, and executing, according to the best of his judgment, the orders he has received, if he is the victim of any mistake he commits, ought certainly never to be assessed with *vindictive* or *speculative* damages." The claim for insurance not paid is certainly a claim of speculative damages. The direction of the court to the assessors was, "to take the prime cost of the cargo and vessel, with interest thereon, including the insurance *actually paid*."

The consideration of the other items is submitted to the consideration of the court.

March 3.

MARSHALL, Ch. J. delivered the opinion of the court.

In this case each party has appealed from the sentence of the circuit court. Maley complains of that sentence because it subjects him to damages and costs for the value of the Mercator and her cargo, first captured by him, and afterwards taken out of his possession by a British privateer, and because, also, some items are admitted into the account, taken for the purpose of ascertaining the sum, for which he is liable, which ought to be excluded from it. Shattuck complains of the sentence because he was not allowed by the circuit court, all the items contained in the report, to the whole of which, he thinks himself entitled.

MALEY v. SHATTUCK.

In discussing the right of Shattuck to compensation for the Mercator and her cargo, the first question which presents itself is, was that vessel and cargo really his property?

Without reciting the various documents filed in the cause, it will be admitted that they demonstrate the affirmative of this question, unless the court be precluded from looking into them by the sentence in Jamaica, condemning the ship and cargo as lawful prize.

On the conclusiveness of the sentence of a foreign court of admiralty, it is not intended now to decide.—For the present, therefore, such sentence will be considered as conclusive, to the same extent which is allowed to it in the courts of Great Britain. But, in those courts, it has never been supposed to evidence more than its own correctness; it has consequently never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. If then, in the present case, the Mercator, with her cargo, may have been condemned as prize, although in fact they were both known to be the property of a neutral, the sentence of condemnation does not negative the averment that they both belonged to Jared Shattuck.

It is well known that a vessel libelled as enemy's property is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorise a condemnation as enemy's property, however clearly it may be proved that the vessel is, in truth, the vessel of a friend. Of consequence, this sentence, being only conclusive as to its own correctness, leaves the fact of real title open to investigation. This positive impediment to inquiry being removed, no doubt upon the subject can be entertained.

It being proved that the Mercator and her cargo belonged to Jared Shattuck, who, though born in the United States, had removed to the island of St. Thomas,

and had acquired all the commercial rights of his domicil before the occurrence of those circumstances which occasioned the acts of congress, under which this seizure is alleged to have been made, the case of the Charming Betsey determines that the vessel and cargo were not liable to forfeiture under those acts.

It remains, then, to inquire whether the Mercator appeared under such circumstances of suspicion as to justify her seizure.

On this point, too, the authority of the Charming Betsey appears to be decisive. In each case the vessel was built in America, and had been recently sold to a person born in the United States, who had become a Danish burgher before the rupture between this country and France; and both cases present the same circumstances of suspicion, derived from the practice of the island to cover American as Danish property.—The points of dissimilitude are, that in the Charming Betsey the captain and crew were of a description to give greater suspicion than the captain and crew of the Mercator; and in the Charming Betsey was found a *proces verbal*, which stated facts unfavourable to that vessel, whereas no similar paper was found in the Mercator. The only circumstance of suspicion attending the Mercator, which did not belong to the Charming Betsey, is that she was bound to Port-au-Prince, and was taken entering the port of *Jacmel*. This circumstance appears to be sufficiently accounted for, but if it was not, the court can perceive in it no evidence of her being American property which can weigh against the testimony offered by the papers that she was Danish. The documents on this point which were thought decisive in the case of the Charming Betsey, exist in this case also. The information of the captain, uncontradicted by any of his crew, in this case, as in that, is corroborated and confirmed by the documents on board the vessel.

The only paper, the absence of which could be important, was an authenticated burgher's brief proving the captain to have been a Danish subject. How far

MALEY v. SHATTUCK.

the absence of this paper might have justified a suspicion in a belligerent that she was enemy-property, so as to excuse from damages for capture and detention, according to the usages of belligerents, the court will not undertake to determine; but it was a casualty which is not sufficient to justify a suspicion that the vessel was American. The burgher's brief is stated to have been in possession of the captain; but is supposed not to have been produced, and consequently it could have no influence on lieutenant Maley. However this may be, no inquiry respecting it was made, and he does not appear to have suggested any difficulty on that ground.

Unquestionably lieutenant Maley had a right to stop and to search the Mercator, and to exercise his judgment on the propriety of detaining her; but, in the exercise of that judgment, he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case, were not sufficiently strong to justify the seizure which was made.

But it is obvious, that lieutenant Maley suspected the Mercator to be a French, not an American vessel.

In his answer he says, that he mistook the captain for a *Frenchman;* in his letter of instructions, he speaks of the vessel as a prize; and in the protest of the American prize-master, she is denominated "*a French prize.*" From these circumstances combined, it is supposed to be sufficiently apparent, that the mistake committed by lieutenant Maley, was in supposing the Mercator to be a *French* vessel liable to capture under the laws of the United States.

The argument of the attorney general, that lieutenant Maley is not liable for this loss, because it was produced by a superior force, which it was not in his power to resist, would have great weight, if the circumstances under which the Mercator appeared had been such as to justify her seizure. But the court is not of that opinion, and consequently that argument loses its application to this case.

Neither is it conceived that the failure of Shattuck to appeal in time, destroys his claim on lieutenant Maley. He had certainly a right to abandon if he chose to do so, and to resort to the captor for damages.

In the opinion given in the circuit court, that the libellant was entitled to compensation for the Mercator and her cargo, this court can perceive no error: but in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear.

In its circumstances, this case so strongly resembles that of the Charming Betsey, that the court will be governed by the rule there laid down. In pursuance of that rule, the rejection of the premium for insurance, *that premium not having been paid*, is approved; but the rejection of the claim for outfits of the vessel, and the necessary advance to the crew is disapproved.—Although the general terms used in the case of the Charming Betsey would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principles with the premium of insurance if actually paid, which was expressly allowed. But this claim is nearly balanced by two items in the account which were admitted, as this court thinks, improperly.

One is the charge of 540 dollars for the expense of soliciting compensation from the United States. The court can perceive no reason for charging this expense to lieutenant Maley.

The other is the charge of 326 dollars and twelve cents, the account of Ross and Hall, for expenses in England.

Had the appeal been prosecuted in time by Shattuck, it is scarcely possible to doubt, but that the sentence of the court, in Jamaica, would have been reversed, in which case it would have been reasonable, that the expense of the prosecution should have been paid by Lieutenant Maley. But as it was not prosecuted in time, in consequence of which, the proceeds of the vessel and

MALEY v. SHATTUCK

cargo were lost, it is not conceived, that lieutenant Maley ought to be charged with the costs of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect.

What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire; but his claim against lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator and her cargo, to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel, and the wages of the crew, and which admits the charges of 540 dollars, on account of the expenses attending the application to the government of the United States, and of 326 dollars and twelve cents, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects, the account is to be reformed, for which purpose, so much of the sentence of the circuit court, as respects this part of the subject, is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

LAWRASON v. MASON.

LAWRASON v. MASON.

A letter from the defendants to *J. M.* saying that they would be his security for 130 barrels of corn, paya-

ERROR to the circuit court of the district of Columbia.

This was an action of *assumpsit*, brought by *Mason*, against *Lawrason*, surviving partner of the firm of *Lawrason & Smoot*, upon the following note:

" Alexandria, 28th November, 1800.

" Mr. James M'Pherson.

" Dear Sir.

" We will become your security for one hundred and thirty barrels of corn, payable in twelve months."

(Signed) " LAWRASON & SMOOT."

ble in 12 months, will maintain an action of *assumpsit* against the defendants, by any person who, upon the faith of the letter, shall have given credit to *J. M.* for the corn.

The declaration contained several counts, laying the *assumpsit* in different forms, but the substance of each was, that the plaintiff, relying on and placing confidence in the promise of the defendants, and at their instance and request, sold and delivered the corn to M'Pherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendants had notice, whereby the defendants became liable, and, in consideration thereof, promised to pay. The defendants pleaded the general issue, and at the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon a demurrer to evidence, which stated, in substance, that the defendants signed and delivered the said note to M'Pherson—that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months—that the agent consulted the plaintiff, who agreed that M'Pherson should have the corn on those terms, if he would give security—that M'Pherson then offered as his security, Lawrason & Smoot. The agent agreed to take them, if they would give their assumption in writing. In a few days afterwards, M'Pherson sent to the agent the said note of Lawrason & Smoot. Before the corn was delivered, the agent informed the plaintiff what had passed between himself and M'Pherson, relative to the corn, and also showed him the note, and asked him whether it would do; to which he replied, he supposed it would. But they called upon Lawrason, and asked him if he was content to be M'Pherson's security for this corn. He hesitated at first, but said he *must be so*, as he had promised; or, as his word was out, *he would*; or words to that effect: whereupon the plaintiff suffered M'Pherson to take the corn.

LAWRASON v. MASON.

at the price of three dollars per barrel, which he agreed to give. That there was another debt due to the plaintiff from M'Pherson, about the 1st of January, 1801, which he was unable to pay.

That about the 1st of January, 1800, M'Pherson gave his promissory note for the amount due for the corn, payable to Lawrason & Smoot, with intent that they should indorse it, but, upon its being presented to Smoot, he refused, saying, that M'Pherson had failed to furnish them with meal, which he had agreed to deliver to them for their indorsement; he therefore would not become security; but upon being shown the note of 28th of November, he acknowledged that it had been given by them.

The plaintiff also produced the certificate of discharge of M'Pherson, under the bankrupt law, dated the 15th of September, 1802, and proved by witnesses that he became insolvent in the year 1800.

Upon this demurrer the judgment of the court below was for the plaintiff.

Swann, for plaintiff in error. The promise in this case was not made to the plaintiff; and no action can be maintained against a person who is a stranger to the consideration, and who is not a party to the agreement, *Cro. El.* 369, *Jordan* v. *Jordan*. *Esp. N. P.* 105, 106. Perhaps an action might lay for the deceit, but not upon the *assumpsit*. The will of both parties must concur at the same moment. If I make an offer of goods at a certain price, and give time to the other party to consider of it, and within the time the other party agrees to the terms, I am not bound to comply. There was no consideration, and consequently no contract, 3 *T. R.* 653, *Cooke* v. *Oxley*.

Besides, it does not appear that the money was ever demanded of M'Pherson; and, until he had refused to pay, no right of action could accrue against the defendant.

C. Lee, contra. There is an essential difference between common contracts and *a letter of credit*. The latter is a mercantile instrument, bottomed upon the principle of *good faith*. It is a promise to him who will give credit to the third person, and the consideration is the actual delivery of the money or goods to the third person, *upon the faith* of the letter of credit. This is, therefore, a promise to the plaintiff, and a good consideration is raised by the delivery of the corn upon the faith of the defendant's note in writing. All the forms of action upon a letter of credit, are in *assumpsit*.

It is objected that no demand was made on M'Pherson; the answer is, that he was known to both parties to be insolvent.

MARSHALL, Ch. J. delivered the opinion of the court to the following effect:

This action is grounded upon a note in writing, which was certainly intended by the defendants to give a credit to M'Pherson. They are bound by every principle of moral rectitude and good faith to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear that the credit was given upon the faith of the letter.

Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported.

In the case cited from *Espinasse*, the rule is laid down too broadly. If compared with analagous cases, it will be found to be considerably modified.

Thus, if money be delivered by *A.* to *B.* to be paid over to *C.* although no promise is made by *B.* to *C.* yet *C.* may recover the money from *B.* by an action of *assumpsit*.

If it be said that in such a case the law raises the *assumpsit* from the facts, and if the facts do not imply

LAWRASON v. MASON.

an *assumpsit*, no action will lay;—it may be answered, that in the present case there is an *actual assumpsit* to all the world, and any person who trusts, in consequence of that promise, has a right of action.

It has been suggested by the counsel for the defendants, that, although an action of *assumpsit* will not lay, yet possibly the plaintiff might support an action for the *deceit*. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lay in any form, the present seems to be at least as proper as any other.

Judgment affirmed.

KNOX AND CRAWFORD v. SUMMERS AND THOMAS.

KNOX ET AL. v. SUMMERS ET AL.

An appearance of the defendant *by attorney* cures all antecedent irregularity of process.

Quere, whether a deputy-marshal can plead in abatement, that the *capias* was not served on him *by a disinterested person?*

ERROR to the circuit court of the district of Columbia.

The plaintiffs in error brought an action of debt on a bond against the defendants, in the court below, to which the defendant, Summers, after *oyer* of the writ, pleaded in abatement, that on the day of the issuing of the original writ, as well as on the day of its service on him, he was one of the marshal's deputies, for the district of Columbia, and that the writ was not directed to a disinterested person, appointed by the court of the district of Columbia, or by any justice or judge thereof, to execute the same. To which plea the plaintiffs demurred specially, 1st. Because the plea was filed long after the appearance of the defendant, Summers. 2d. Because, after his appearance to the suit, no objection can be urged to the irregularity of the service of the process. 3d. Because, if the process was irregularly issued, directed, or served, the remedy was by motion and not by plea, and 4th. Because the process was duly issued, directed and served. But the court below adjudged the

plea to be good, and ordered the writ to be quashed as to both defendants. Whereupon, the plaintiffs sued out their writ of error.

By the 28th section of the act of congress of the 24*th of September*, 1789, *vol.* 1, *p.* 66, it is enacted, "That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein *shall* be directed to such disinterested person as the court, or any justice or judge thereof, may appoint; and the person so appointed, is hereby authorised to execute and return the same."

Swann, for the plaintiffs in error. The provision of the act of congress was not intended for the benefit of the marshal, or his deputy, but of the other party. The word "shall," in this, as in many other cases, means *may*. It *shall* be directed to a disinterested person, if the other party shall request it. But if the direction of the writ to the marshal was an informality, it is cured by the *general* appearance of the deputy marshal. *Co. Lit.* 325. 2 *Ld. Ray.* 1544, *Blenkinson* v. *Iles*. The record states, that there was judgment by default, *at the rules* against both defendants, and that at the next court, on the motion of the *defendants*, by Walter Jones, jun. *their attorney*, it was ordered that the suit be returned to the rules for proceedings anew. At the next rules, the record states, that "the said Lewis Summers, *in his proper person*, comes and defends the force and injury, &c. and prays *oyer* of the writ," &c. So that this plea, in abatement, was not put in until after he had appeared by his attorney, and set aside the office judgment.

But this is not a matter pleadable in abatement. If a person is improperly arrested, his remedy formerly was by a writ of privilege, but now it is by motion to be discharged. He cannot plead it.

C. Lee, contra. When the cause was sent back to the rules for proceedings anew, it was as if nothing had been done at the rules. Every thing was to begin *de novo*. The defendant, Summers, is to be considered as then appearing for the first time; and instantly, upon his appearance, he pleaded in abatement in *propria persona*.

KNOX ET AL. v. SUMMERS ET AL.

It does not appear, upon the writ, that he was a deputy marshal. It could not, therefore, be taken advantage of upon motion. Or if it could, yet that is not the most regular way. Upon a motion, the fact must appear by *affidavit*, and the *court* must decide the *fact*. But upon a *plea*, the fact is *put in issue* and tried by the *jury*, the proper tribunal to try a question of fact.

The law is express and positive; "the writ *shall* be directed" to a disinterested person. There is no discretion in the court.

Where it appears to the court, *from the writ itself*, that it ought to abate, there the court, *ex officio*, ought to give judgment against the plaintiff, though the defendant does not plead it in abatement; but it is otherwise where this does not appear in the writ. 4 *Bac. Ab.* 44. Where the fact does not appear upon the record, it must be pleaded in due time.

WASHINGTON, J. The defendant could not set aside the office judgment, without entering his appearance.

C. Lee. If such an appearance is to cure all antecedent error, no plea in abatement could be put in, although the office judgment was irregularly obtained; nor could the defendant take advantage of irregularity at the rules; although the court is, by the express provisions of the law, authorised to set aside the proceedings at the rules.

The court were unanimously of opinion, that the appearance by attorney cured all irregularity of process. The defendant, perhaps, might have appeared *in propria persona*, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity.

The *judgment reversed*, the defendant ordered to answer over, and the cause remanded for further proceedings.

SANDS v. KNOX.

ERROR to the court for the trial of impeachments, and the correction of errors, in the state of New-York.

The *non-intercourse* act of June 13th, 1798, did not impose any disability upon vessels of the United States, sold *bona fide*, to foreigners residing out of the United States during the existence of that act.

Thomas Knox, administrator, with the will annexed, of *Raapzat Heyleger*, a subject of the king of *Denmark*, brought an action of trespass *vi et armis*, in the supreme court of judicature, of the state of New-York, against *Joshua Sands*, collector of the customs for the port of New-York, for seizing and detaining a schooner called the Jennett, with her cargo. The defendant, *Sands*, pleaded in justification, that he was collector, &c. and that after the 1st day of July, 1798, viz. on the 16th of November, 1798, the said schooner, then being called *The Juno*, was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz. from Middletown to the island of *St. Croix*, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West-Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel was not, and should not be employed during her said intended voyage, or before her return as aforesaid, in any traffic or commerce, with, or for any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December, 1798, she did proceed, and was voluntarily carried from Middletown to the island of *St. Croix*, in the West-Indies, and from thence, before her return within the United States, to *Port de Paix*, in the island of *St. Domingo*, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or

SANDS v. KNOX.

want of provisions, or actual force and violence, whereby, and according to the form of the statute, the said schooner and her cargo became forfeited, the one half to the use of the United States, and the other half to the informer; by reason whereof, the defendant, being collector, &c. on the 1st of July, 1799, arrested, entered, and took possession of the said vessel and cargo, for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, &c. that at the time she sailed from Middletown for *St. Croix*, she was owned by a person then resident in the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to *St. Croix*, where she arrived on the 1st of February, 1799, the said island of St. Croix, then and yet being under the government of the king of Denmark. That one *Josiah Savage*, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at *St. Croix*, to the said *Raapzat Heyleger*, who was then, and until his death continued to be, a subject of the king of Denmark, and resident at St. Croix, who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from *Port de Paix* to *St. Croix*, *Without that*, that she was at any other time carried, &c.

To this replication there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the *court for the trial of impeachments and correction of errors, in the state of New-York*, was, to this court, affirmed.

The defendant now brought his writ of error, to this court under the 25th section of the *judiciary act* of the United States, *vol.* 1, *p.* 63.

The only question which could be made in this court, was upon the construction of the act of congress, of *June* 13th, 1798, *vol.* 4, *p.* 129, commonly called *the non-intercourse act*; the 1st section of which is in these words: "That no ship or vessel, owned, hired, or employed,

wholly or in part, by any person resident within the United States, and which shall depart therefrom after the 1st day of July next, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West-Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction, or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place, as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted, and condemned, in any circuit or district court of the United States, which shall be holden within and for the district where the seizure shall be made."

The condition of the bond, stated in the plea, corresponded exactly with that required by the 2d section of the act.

The 70th section of the act of 2d of March, 1799, *vol.* 4, *p.* 390, makes it the duty of the several officers of the customs, to seize any vessel liable to seizure, under that or any other act of congress respecting the revenue.

C. Lee, for the plaintiff in error.

The question is, whether the act of congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West-Indies, under the acknowledged government of France." She was also a vessel which, "in a voyage

SANDS v. KNOX

thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act, which, according to the letter of the law, rendered her liable to forfeiture, seizure, and condemnation.

It is true, that the decision of this court, in the case of the Charming Betsey, *ante*, *vol.* 2, *p.* 115, seems at first view to be against us. But the present question was not made, and could not arise in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents, were to be permitted, the whole object of the *non-intercourse* act would be frustrated. A vessel of the United States may, according to the judgment in the case of the Charming Betsey, be sold and transferred to a Dane, and he may trade with her as he pleases; but we say it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American *citizens*, but American *vessels*, from carrying on an intercourse with French ports.

The case of the Charming Betsey was under the act of February, 1800; but the present case arises under that of 1798, which is very different in many respects. The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination.

Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel before her return. If therefore a sale is made it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom-house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better

situation than before, for she will receive her usual supplies and we shall be weakened by the loss of the carrying trade.

Bayard, contra, was stopped by the court.

MARSHALL, Ch. J.

If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no *bona fide* sale and transfer of the vessel, the court does not wish to hear any argument on the part of the defendant in error.

It considers the point as settled by the opinion given in the case of the Charming Betsey, with which opinion the court is well satisfied.

The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bona fide* sale and transfer to a foreigner.

Judgment affirmed.

RANDOLPH v. WARE.

A promise by a merchant's factor that he would write to his principal to get insurance done, does not bind the principal to insure.

THIS was an appeal from a decree of the circuit court, for the district of Virginia, which dismissed the complainant's bill in equity.

Ware, the executor of Jones, surviving partner of the house of Farrel and Jones, British merchants, had in the same court, at June term, 1800, obtained a decree against William Randolph, administrator *de bonis non*, with the will annexed, of Peyton Randolph, for a large

RANDOLPH v. WARE.

sum of money, with liberty to William Randolph to file this bill against Ware, for relief in regard to 50 hogsheads of tobacco, shipped in September, 1771, in the ship Planter, captain Cawsey, and consigned to Farrel and Jones; a credit for which had been claimed, but was by the decree disallowed.

The tobacco never came to the hands of Farrel and Jones, having been lost at sea without being insured.

The appellant contended, that he was entitled to a credit for the customary insurance price of the tobacco, *viz.* 10*l.* per hogshead with interest.

1. Because, from the usage of the trade between the Virginia planter and the British merchant, it was the duty of the latter to have insured the tobacco, and that having failed so to do, he is responsible as insurer.

2. Because Thomas Evans, the appellee's agent for soliciting consignments and managing this business, having promised to get the insurance done, it is equivalent to the promise of his principals, Farrel and Jones, and they are responsible for the consequences.

3. It was contended, that the claim, under all circumstances disclosed in the record, if not fit to be decreed, according to the prayer of the bill, appears to be of a nature proper to be decided in a court of law, in pursuance of an order of the court of equity, and therefore, that the decree should be reversed, and an order made, directing a trial at law, to ascertain whether the appellee is not liable to the appellant for the value of the tobacco, and interest from the month of September, 1772, as standing in the place of insurer thereof.

C. Lee, for the appellant.

1. The common course of the trade was, for the British merchant to cause insurance to be made, upon notice of the shipment of the tobacco: and it appears by the letters exhibited in this record, that Farrel and Jones did, without any special orders, cause insurance to be made on some of the tobacco shipped by Randolph's executors.

Thus, in their letter of August 1, 1769, to Richard Randolph, they say, "we have made the following insurance on the *True Patriot*," for the two estates, viz. 480*l.* on 40 hogsheads, W. Randolph's estate; 816*l.* on 68 hogsheads, P. Randolph's," but say nothing of having received orders therefor. And again, August 10, 1769, "we have made 816*l.* insurance on the *True Patriot*, on 68 hogsheads *which captain Cawsey informs us he is to have.*"

It is true, that on the 15th of August, 1771, they say, "Captain Cawsey writes us that he is promised 67 hogsheads of the estate's tobacco, *but we have received no order's for insurance.*" But they had received no orders for the insurance they made in August, 1769, on the 68 hogsheads which captain Cawsey informed them he was to have. The executors had a right to expect, that as Farrel & Jones had made insurance without orders, on the 68 hogsheads, by the *True Patriot*, they would also have insurance made on the 50 hogsheads by the *Planter*.

The appellee's amended answer, put in after this point was known, does not pretend that any orders were given for the insurance, made in 1769, on the 68 hogsheads. And in the accounts of Farrel & Jones, there are many charges of premiums on insurances, for which no orders appear to have been given.

2. But the deposition of P. L. Grymes, goes to establish an agreement, on the part of Evans, the *agent of* Farrel & Jones, to get insurance done upon the 50 hogsheads in question.

This deposition is corroborated by the fact, that in the correspondence produced, there is no letter of the executors, respecting the shipment of that parcel of tobacco. They relied, altogether, upon the promise of Evans.

No argument against the claim can arise from the length of time which elapsed before it was made. The estate of Randolph was acknowledged to be indebted; the executors, therefore, would not bring a suit. It was time enough to exhibit their claim when suit was brought

RANDOLPH v. WARE.

against them. Besides, from 1774 to 1783, the war interposed; after that time until the suit was brought, the courts of justice were absolutely shut, or legal impediments existed to the recovery of British debts. The executors, also, might have been *ignorant of their right*. This suit, therefore, ought to be considered as if it had been instituted in 1775.

3. This is a claim proper to be settled in a court of law. There is a difference between a case where the chancellor will order an issue at law to be tried, to satisfy or inform his conscience, and where the whole claim is a matter properly cognizable at law.

P. B. Key, contra.

1. There is no evidence in the record of such a general usage of the trade, as is contended for by the appellant. And if there had been, the voluminous correspondence, exhibited in the cause, shows most clearly, that it did not exist in the negotiations between the present parties. For it proves, that in almost every instance, where the Randolphs shipped tobacco, they ordered insurance to be made at the time they gave notice of the shipment. Farrel & Jones, in their letter of August 6th, 1770, (stated in the appellee's answer) say, "We made no insurance on the *Virginian*, though we were a little uneasy that so large a quantity as 66 hogsheads were ventured home without it, for it is our rule not to make any insurance, without orders, upon tobacco; *which you will please to remember.*"

On the 15th of August, 1771, they say, "Captain Cawsey writes us that he is promised 67 hogsheads of the estate's tobacco, *but we have received no orders for insurance.*"

On the 17th of September, 1771, the tobacco in question, was shipped. On the 10th of December, 1771, Farrel & Jones write to the Randolphs as follows: "We wrote you the 15th of August, by the *True Patriot*, captain Aselby, to which we refer. We observe by our agent Mr. Evans' letter, that you have shipped 50 hogsheads of the estate's tobacco, on board captain Cawsey, and it gives us great concern to find you ordered no

insurance on them, though we wrote you in August 1770, that we never made any insurance on tobacco, without orders; as we are much afraid some accident has happened to him. He has now been sailed from Virginia twelve weeks, and by accounts we have from captains who sailed from America about that time, he must have had dreadful weather in a few days after he came out. We think there is no other chance for him, but that he has lost his masts and obliged to bear away for the West-Indies."

In their letter to the Randolphs of 4th April, 1772, they say, "You have also, inclosed, the estate's account current to the 31st December, balance in our favour £ *if any error, you will please to advise us.*"

And in August 15, 1772, they say, "As yet we have received no orders for insurance on the Elizabeth, on account of the estate. If any tobacco is shipped in her, we hope to receive directions in time *to prevent the like accident as happened last year.*"

On 23d of April, 1773, they say, "Having settled the account current agreeable to what Mr. Evans wrote us, we send it to you inclosed. Balance in our favour £ *if any error, please to advise.*"

On the 10th of August, 1774, they write, "You have also, inclosed, the estate's account current to 31st December last; balance in our favour £ *if any error, please to advise.*"

And on the 10th of March, 1773, they sent the estate's account current to 31st of December, with the same request, "*if any error, please to advise.*"

Here the correspondence was closed by the war; after which, in 1783, the house of Farrel & Jones sent out an agent, Mr. Hanson, who was known as such to the Randolphs, and who, in that capacity, transacted business with them, and who continued in Virginia until the year 1800.

RANDOLPH v. WARE.

During the whole of this period, of nearly 30 years, not a syllable was said of any claim against Farrel & Jones, on account of the 50 hogsheads of tobacco lost in the *Planter*.

In addition to all this, it appeared, by the exhibits in this cause, that some time in June, 1772, after the loss of the tobacco was known to the Randolphs, they gave their bond, ante-dated on the 1st of January, 1772, for the balance then due, without any credit being given for the lost tobacco.

2. But it is contended, that Farrel & Jones had, in some instances, made insurance without orders, and, therefore, they were bound to do it in this instance.

We deny the fact. Although, in one or two instances, F. & J. have, in their letters, mentioned having made insurance, without stating it to be *by order*, yet it does not follow that no orders were given. And the whole general tenor of the correspondence shows, that it was not their usual practice to insure without orders.

3. The appellant relies upon the affidavit of Grymes, to show that Evans, the agent of Farrel & Jones, promised to have insurance done.

This affidavit appears in the transcript of the record, without date, place or circumstance. It does not appear to have been sworn before any magistrate competent to administer an oath, and no cross-examination, nor any thing to show upon what occasion it was made. It is uncertain in itself, uncorroborated by any other part of the testimony, and inconsistent with the general tenor of it. He says the conversation happened *early in the year*; but the tobacco was shipped in September. His words are, "He the said Evans informed the aforesaid Peyton and Richard Randolph, that he was writing to the aforesaid house of Farrel & Jones, that he would direct insurance to be made," "and that they need give themselves no further trouble in the business."

The long time which had elapsed before this deposition was made, (probably 30 years) renders its contents of very little weight, especially as there were a number of shipments of tobacco made at different times in the same ship, and he swears the conversation happened early in the year. It appears from the correspondence, that early in the year preceding, viz. 1770, the same ship had been loaded with tobacco at the same place; and this renders it probable that Mr. Grymes had mistaken the year.

But admitting that it proves all that is contended—yet Evans was not competent to bind his principal to insure; it was not a matter within his agency.

JOHNSON, J. I found my opinion in this case upon a single consideration. It was incumbent on the appellant to show that Evans' neglecting to comply with his promise to insure, made Farrel & Jones liable. I think it did not, because it appears that Farrel & Jones did not generally hold themselves bound to insure shipments of tobacco, without receiving express instructions to do so. It was, therefore, incumbent upon the executors of Randolph to communicate such instructions to Farrel & Jones. If they confided in the promise of Evans to give these instructions, it was to their own prejudice. And although the failure of Evans to do so, certainly made him personally liable to them, yet it could not produce a liability in Farrel & Jones. So far as Evans was entrusted to do an act incumbent on the appellant's testator himself to do, he was the agent of the executors of Randolph, and not of Farrel & Jones.

WASHINGTON, J. In this case it appears that a letter was written by Farrel & Jones, in August, 1770, notifying the executors of Randolph, that they would not make insurance without orders. And it is shown also, that the Randolphs were accustomed to give orders for insurance whenever they wished to have it made. Whatever then may be the general usage of the trade, it will not apply to the present case.

RANDOLPH v. WARE.

The deposition of Grymes comes in a very questionable shape. It speaks of things 30 years ago, and in very uncertain language. But admitting for a moment that it applies to this shipment, Evans had not authority to bind his principal by a promise to insure. He did not promise for them, but promised for himself, that *he* would write to them to make insurance. This, it is admitted, he did not do. Are Farrel & Jones liable for his personal engagement?

But the deposition of Grymes is not only uncorroborated, but opposed by the other evidence in the cause. If the Randolphs relied upon this supposed engagement of Evans, why did they give their bond in 1772, nine months after the loss, and long after they had notice of the loss, for the balance of the account, without demanding a credit for the lost tobacco? Three accounts current were sent them for the years 1772, 1773 and 1774, at several times, and they were requested at each time to examine them, and, if they contained any error, to advise Farrel & Jones of it. By not doing this, they have given strong evidence that there was no such agreement with Evans, that there was no error in the accounts, and that Mr. Grymes must have been mistaken, or that his deposition refers to some other transaction.

PATERSON, J. The complainant filed a cross bill to obtain credit for 50 hogsheads of tobacco, which were shipped on board the *Planter*, the 17th September, 1771, by Richard and Peyton Randolph, executors of Wm. Randolph, and consigned to Farrel & Jones, merchants, at Bristol, in England. The tobacco was not insured. The *Planter* foundered at sea, and the tobacco was lost. The question is, who shall sustain the loss? It is contended, on the part of the representatives of the Randolphs, that Farrel & Jones ought to have insured the tobacco, and not having done so, they have made themselves liable to the amount, as if it had been insured. To establish this position, the counsel for the complainan has taken the following grounds.

1st. From the nature and usage of the trade between the Virginia planter and the English merchant, it was

the duty of the latter to have insured the tobacco, and failing so to do, he is responsible as the insurer.

2d. That Thomas Evans, the agent of Farrel & Jones, having promised to have insurance made, it is equivalent to the promise of his principals, Farrel & Jones, and they are responsible for the consequences.

As to the first point, no usage has been proved. And if an usage did exist, this case was taken out of it; as it appears by the whole course of correspondence between the parties, that Farrell & Jones never did insure tobacco without orders; and that the Randolphs gave them orders to effect insurances on tobacco, whenever they thought it expedient or necessary.

Great stress is laid on the contract, which it is stated was entered into between the Randolphs and Thomas Evans, the agent of Farrel & Jones. The contract is founded on the deposition of Philip Grymes. This deposition is certainly open to the strictures which have been made upon it by the counsel on the part of the defendant. It does not appear when, and before whom, the deposition was taken. The deposition is *ex parte*, for neither the defendant or his attorney had an opportunity to cross-examine the witness. If it was taken at or about the time that the bill was filed, then it is liable to the objections resulting from the frailty and uncertainty of memory, and the misconception or misconstruction of words used in a general conversation, after a long period of time, exceeding twenty years. Besides, the quantity of tobacco to be insured was not mentioned in the course of the conversation, nor does it appear, that it was at any time afterwards communicated to the agent; and unless the quantity was ascertained, an insurance could not be effected. How this paper, purporting to be a deposition, became annexed to the bill, I have not been able to discover from the proceedings; and if it be admitted as a piece of evidence in the cause, its credit is much impaired in consequence of the observations already made.

The acts of the agent bind the principal; and supposing Evans to have been the general agent of Farrel

RANDOLPH v. WARE.

& Jones, it may well be questioned, whether his undertaking to insure, is obligatory upon them; as it is manifest, from the correspondence between the Randolphs and Farrel & Jones, that the latter did not insure tobacco without express orders for that purpose; that the Randolphs wrote to them to insure, when they deemed an insurance proper. The fair inference is, that if Evans engaged to have an insurance made in this instance by Farrel & Jones, it was a personal contract on his part, which bound himself and no other, and for the performance of which he was responsible in his private character. Orders for insurance were invariably transmitted by the Randolphs to Farrel & Jones, and not communicated to them through the medium of Evans, unless the present should be considered as an exception. Under such circumstances, the Randolphs, if they relied on the promise of Evans, must look to him individually, and not through him to Farrel & Jones. By this promise, Evans bound himself, and not the firm.

The house of Farrel & Jones transmitted annually their accounts to the Randolphs; they did so for the year 1771, after the loss of the tobacco, which it is admitted was not passed to the credit of the Randolphs. The bond given for the balance is dated the 1st January, 1772, though, from the letter of the 4th April, 1772, it was not, probably, executed till some months after its date. It was made to bear date the 1st January, 1772, that it might correspond with the accounts rendered, and carry interest from that period. Farrel & Jones annually rendered regular and stated accounts to the Randolphs of their mutual dealings in the years 1772, 1773, and 1774; and in a letter of the former to the latter, Farrel & Jones particularly requested, that errors, if any occurred, should be pointed out, that they might be rectified. But the Randolphs made no objections—they made no mention of the tobacco which was lost, nor did they ever intimate an opinion, that Farrel & Jones were liable for its amount. Why this silence, this acquiescence? The period of the war we will let pass without animadversion, as no dealings or communication took place between the parties. Evans died in 1778. In 1780 Hanson was appointed the agent of Farrel & Jones. It was never suggested to Hanson, that the Ran-

dolphs, or their representatives, claimed an allowance for the tobacco; no intention was manifested to charge Farrel and Jones with it, until an action was commenced on the bond, in 1793, or 1794, when, for the first time, a claim was set up for the tobacco. Mr. Lee has endeavoured to account for this silence and acquiescence, but not in a satisfactory manner; and it is probable that the Randolphs never thought of making any demand, because they were convinced that they had no right to do so, and that they must sustain the loss themselves, as they had neglected to order Farrel and Jones to make the insurance. It was a loss justly imputable to their own neglect or imprudence; or if not, then they intended to stand their own insurers.

Farrel and Jones expressed regret whenever they received no orders to insure; and this flowed from the nature and situation of their accounts and dealings: for as the Randolphs were indebted to the firm, in a large amount, it became the interest of Farrel and Jones, that the tobacco should be insured, as it was property intended to be appropriated towards the payment of the debt due to them. The loss rendered the Randolphs the less able to pay, and increased the risk of Farrel and Jones, by diminishing their security. An insurance, therefore, of the property of the debtor, must have been beneficial and satisfactory to the creditor. But this insurance, it seems, the house of Farrel and Jones never thought themselves authorised to make, unless they received immediately from the Randolphs explicit directions for the purpose.

The charge is stale. The claim comes too late; it is brought forward after a sleep of near 30 years, during which period the original parties and their agents have disappeared and are no more. An acquiescence for such a length of time, and under such circumstances, is too stubborn and inveterate to be surmounted. The claim was put into oblivion; and there it ought to have remained. A court of equity should not interpose in a case of this kind; and, therefore, the decree pronounced by the circuit court ought to be affirmed.

CUSHING, J. concurred.

Judgment affirmed.*

* MARSHALL, Ch. J. did not sit in the cause, having decided it in the court below.

FIELD v. MILTON.

FIELD v. MILTON.

A *certiorari* will be awarded, upon a suggestion that the *citation* has been served, but not sent up with the transcript of the record.

W. PINCKNEY, for plaintiff in error, suggested, that the citation had been served, but was not returned by the clerk below with the writ of error, and prayed a *certiorari*.

The court said it was a new case.

Certiorari granted.

WINCHESTER v. JACKSON AND OTHERS.

WINCHESTER v. JACKSON AND OTHERS.

Costs will be allowed upon a dismission of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error.

THE writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states.

Campbell, for defendants in error, prayed that the dismissal might be *with costs*, the original defendants being also defendants in error.

The clerk stated that the practice had heretofore been to dismiss without costs, where the dismission was for want of jurisdiction.

The court directed it to be dismissed *with costs*.

END OF THE THIRD VOLUME.

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ABATEMENT.

Quere, whether a deputy marshal can plead in abatement, that the *capias* was not served on him by a disinterested person?
Knox v. *Summers*, 496

ACTION.

1. An action for goods sold and delivered cannot be maintained by him who received a note as conditional payment therefor, and has passed away that note.
Harris v. *Johnston*, 311
2. If part of the goods were the sole property of D. and the residue the sole property of I. and if I. had authority from D. to sell D's. part, I. may maintain an action for the whole in his own name.
id. *ib.*
3. An action for money had and received will not lie for the United States against the assignees of a bankrupt, for the price of a ship sold by them as the property of the bankrupt who had taken a false oath to obtain a register; the ship not having been seized by the United States for the forfeiture before the sale and transfer.
United States v. *Grundy & Thornburgh*, 337
4. Quere, whether an action for money had and received, will lie to establish a forfeiture for an act committed by a third person?
id. *ib.*

AGENT.

1. See *Action*, 2.
2. A factor may be justified by the orders of an agent, in deviating from the written orders of the principal.
Manella v. *Barry*, 415
3. An agent for collecting of debts merely, is not a *factor* within the 13th section of the act of limitations of Virginia.
Hopkirk v. *Bell*, 454
4. A promise by a merchant's factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. *Ware*, 508

AGREEMENT.

1. The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States.
Hannay v. *Eve*, 242
2. See *Agent*, 4.

APPEAL.

1. The act of congress allowing appeals without a statement of facts, applies to decrees made before the date of that act.
United States v. *Hooe*, 79
2. No appeal or writ of error lies in a *criminal case*.
United States v. *More*, 159
3. A decree for a sale of the mortgaged property on a bill to foreclose, is a *final* decree from which an appeal lies.
Ray v. *Law*, 179

APPEARANCE.

An appearance of the defendant by attorney, cures all antecedent irregularity of process.
Knox v. *Summers*, 496

ASSUMPSIT.

1. See *Action*, 1, 2, 3, 4.
2. *Assumpsit* will lie upon a letter of credit, by him who trusts a third person upon the faith of that letter.
Lawrason v. *Mason*, 493

ATTORNEY.

1. Notice of the time and place of taking a deposition, given to an *attorney at law*, is not sufficient under the law of Virginia.
Buddicum v. *Kirk*, 293
2. An *attorney at law* may agree to receive or waive notice, and cannot afterwards allege the want of it. *id.* *ib.*

BANKRUPT.

1. The United States have no *lien* on the *real* estate of their debtor, until suit brought, or bankruptcy, &c.
United States v. *Hooe*, 73
2. If the defendant plead the bankruptcy of the indorsor in bar, the plaintiff may reply, that the note was given to the indorsor in trust for the plaintiff.
Wilson v. *Codman*, 193
3. See *Legacy*.

BOND.

1. A variance in date between the bond declared upon, and that produced on *Oyer*, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder.
Cooke v. *Graham*, 229
2. The court may depart from the letter of the condition of a bond to carry into effect the intention of the parties.
id. *ib.*
3. See *Collector*, 2.
4. A discharge from the prison-rules under the insolvent act of Virginia, although obtained by fraud, is a discharge *in due course of law*; and upon such discharge no action can be maintained upon the prison-bounds-bond.
Simms v. *Slacum*, 300

BRITISH SUBJECTS.

1. Quere, whether a British subject, born in England in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia by descent or devise?
Lambert v. *Paine*, 97
2. The treaty of peace between Great Britain and the United States prevents the operation of the act of limitations of Virginia upon British debts contracted before that treaty.
Hopkirk v. *Bell*, 454

CAPTURE.

The commander of a United States ship of war, if he seizes a vessel on the high seas, *without probable cause*, is liable to make restitution in value with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss.
Maley v. *Shattuck*, 458

CAVEAT.

A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits.
Wilson v. *Speed*, 283

CERTIORARI.

A *certiorari* will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.
Field v. *Milton*, 514

CHANCERY.

1. A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree, and may be appealed from.
Ray v. *Law*, 179
2. A *plea* in bar, to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an *answer*, but not for a *plea*.
Milligan v. *Milledge*, 220
3. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.
id. *ib.*

4. The want of proper parties is not a sufficient ground for dismissing the bill.
Milligan v. *Milledge*, 220
5. If the executor has no assets you may proceed in equity against the devisees or legatees.
id. 228

CITATION.
See *Certiorari*.

COLLECTOR.
1. See *Mortgage* 1. *Petersburgh*.
2. To support a judgment on a collector's bond at the return term, it must appear by the record, that the writ was executed 14 days before the return day.
Dobynes v. *United States*, 241

CONTRACT.
1. The *Court* has the exclusive power of deciding whether a written contract be usurious.
Levy v. *Gadsby*, 181
2. He who sells property on a description given by himself is bound in equity to make good that description.
M'Ferran v. *Taylor*, 270
3. On a contract to deliver flour, its value is to be ascertained on the day when it ought to have been delivered.
Douglass v. *M'Allister*, 298

COSTS.
1. Costs are not to be awarded against the *United States*.
United States v. *Hooe*, 73
2. In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both.
Peyton v. *Brooke*, 92
3. Costs will be allowed on the dismissal of a writ of error for want of jurisdiction, if the original defendant be also defendant in error.
Winchester v. *Jackson*, 514
4. If errors are not assigned, according to the rule of court, the writ of error may be dismissed with costs.
General Rule, 239
5. If the plaintiff in error does not appear, the defendant may have the writ of error dismissed with costs.
Montalet v. *Murray*, 249

COURT.
1. The court has the exclusive power to decide whether a written contract be usurious.
Levy v. *Gadsby*, 181
2. The court, upon a jury trial, is bound to give an opinion if required, upon any point relevant to the issue.
Douglass v. *M'Allister*, 298

COURT MARTIAL.
1. The court martial of the district of Columbia has not exclusive cognisance of the question who are subject to militia duty, and its sentence is not conclusive upon that point.
Wise v. *Withers*, 331
2. The court martial who impose a fine upon a man, not liable to militia duty, are equally trespassers with the officer who distrains for such fine.
id. *ib.*

DAMAGES.
In estimating damages for breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose.
Douglass v. *M'Allister*, 298

DEBTOR.
See *Lien*.

DECLARATION.
1. In a declaration, the averment that the assignment of a promissory note was for *value received*, is an *immaterial* averment and need not be proved.
Wilson v. *Codman*, 193
2. A replication stating that the note was given to the indorsor *in trust for the plaintiff* is not a departure from the declaration which avers the note to have been given for value received.
id. *ib.*

DECREE.
A decree for the sale of mortgaged property, on a bill to foreclose, is a final decree and may be appealed from.
Ray v. *Law*, 179

DEMURRER.

See *Pleading*.

DEPARTURE.

See *Pleading*, 6.

DEPOSITION.

See *Attorney*, 1, 2. *Notice*, 1, 2. 3.

DEVIATION.

See *Insurance*, 4.

DEVISE.

1. A devise of "*All the estate called Marrowbone, in the county of H. containing by estimation* 2,585 *acres of land*," carries the fee.
Lambert v. *Paine*, 97
2. Quere, whether a British subject born in England, in 1750, and who always resided there, could in the year 1786, take and hold lands in Virginia by descent or devise?
id. *ib.*
3. See *Chancery*, 5.

DISCHARGE.

A discharge from prison by a competent tribunal, *obtained by fraud*, is a discharge *in due course of law*.
Simms v. *Slacum*, 300

DISTRICT OF COLUMBIA.

1. No appeal or writ of error, *in a criminal case*, lies from the judgment of the circuit court of the district of Columbia.
United States v. *More*, 159
2. Quere, whether the act of congress, abolishing the fees of justices of the peace, in the district of Columbia, can affect those justices who were in commission when that act was passed?
id. *ib.*
3. The plaintiff in error must file a transcript of the record with the clerk of the supreme court of the United States, within the first 6 days of the term.
General Rule, 239
4. An *executor* cannot maintain a suit in the district of Columbia, upon letters testamentary granted in a foreign country.
Dixon v. *Ramsay*, 319
5. A justice of the peace in the district of Columbia, is an officer of the government of the United States, and is exempt from militia duty.
Wise v. *Withers*, 331
6. See *Court Martial*, 1, 2.

EQUITY.

1. See *Appeals*, 1.
Chancery, 1, 5.
Contracts, 2.
2. The holder of a promissory note in Virginia, payable to order may, *in equity*, sue a *remote* indorsor, *but not at law*.
Harris v. *Johnson*, 311

EVIDENCE.

1. If usury be specially pleaded, and the court reject the evidence offered upon the special plea, it may be admitted upon the general issue.
Levy v. *Gadsby*, 180
2. The court has the exclusive power to decide whether a written contract be evidence of usury.
id. *ib.*
3. A report of surveyors that a vessel is unsound, is not evidence that she was not seaworthy when she commenced the voyage.
Marine In. Co. v. *Wilson*, 187
4. Quere, whether such report, even if it related to the commencement of the voyage, is *conclusive* evidence?
id. *ib.*
5. The assignee of a pre-emption warrant is a competent witness if his testimony does not tend to support the title of the party producing him.
Wilson v. *Speed*, 283
6. Notice to an attorney *at law* of the time and place of taking a deposition, is not sufficient under the law of Virginia.
Buddicum v. *Kirk*, 293
7. The deposition must be taken at the time notified; an adjournment from the 12th to the 19th, is not an adjournment from day to day.
id. *ib.*
8. Evidence of *wheat delivered* is good on the plea of payment.
id. *ib.*

9. An assignment of debts cannot be given in evidence under the plea of *accord and satisfaction*.
Buddicum v. *Kirk*, 293
10. A bill of parcels stating the goods as bought of *D. & I.* is not conclusive evidence that *D. & I.* were *joint* owners of the goods.
Harris v. *Johnston*, 311
11. The sentence of a court martial is not conclusive evidence that a man is liable to militia duty.
Wise v. *Withers*, 331
12. A foreign sentence of condemnation *as good prize*, is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation.
Maley v. *Shattuck*, 458

ERRORS.

If errors are not assigned according to the rule of court, the writ of error will be dismissed with costs.
General Rule, 239

EXECUTOR.

1. Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on the production of the letters testamentary before the executor shall be permitted to prosecute.
Wilson v. *Colman*, 193
2. See *Legacy*, 1.
3. An executor cannot maintain a suit in the district of Columbia, upon letters testamentary granted in a foreign country.
Dixon v. *Ramsay*, 319

FACTOR.

1. A factor may be justified by the orders of a general agent in departing from the written instructions of the principal.
Mauella v. *Barry*, 415
2. An agent for collecting debts merely, is not a *factor* within the 13th section of the act of limitations of Virginia.
Hopkirk v. *Bell*, 454
3. A promise by a factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. *Ware*, 503

FOREIGN SENTENCE.

A foreign sentence as good prize, is not conclusive evidence that the legal title to the property was not in the subject of a neutral nation.
Maley v. *Shattuck*. 458

FORFEITURE.

If a false oath be taken to procure a register for a vessel, the United States have an election to proceed against *the vessel* as forfeited, or against the person who took the false oath for its value. But, until that election is made, the title to the vessel does not vest in the United States under the forfeiture; and the United States cannot maintain an action for money had and received against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel and received the purchase-money *before the seizure of the vessel*.
United States v. *Grundy & al.* 337

FREIGHT.

Quere, whether the mortgagee of a ship is entitled to the freight?
Hodgson v. *Butts*, 140

FRAUD.

1. The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States and the object of the agreement a mere stratagem of war.
Hannay v. *Eve*, 242
2. A discharge under an insolvent act, *obtained by fraud, is a discharge in due course of law*.
Simms v. *Slacum*, 300

GENERAL RULE.

1. If the transcript be not filed by the 6th day of the term, either party may have a continuance, 239
2. If judgment below be 30 days before the sitting of this court, the record must be filed within the first 6 days of the term, 239

3. In all cases from the district of Columbia, the record must be filed within the first 6 days of the term, 239
4. If errors are not assigned according to the general rule, the writ of error will *be dismissed* with costs, 239
5. If the defendant refuses to plead, the court will proceed *ex parte*, 239

HABEAS CORPUS.

A warrant of commitment by justices of the peace must state a *good cause certain, supported by oath.*
Ex parte Burford, 448

INSOLVENT.

1. The United States have no lien on the real estate of their debtor, until suit brought, or bankruptcy, or a *notorious* insolvency has taken place; or being unable to pay *all* his debts he has made a voluntary assignment of *all* his property; or having absconded, his property has been *attached* by process of law.
United States v. *Hove*, 73
2. A discharge under an insolvent law, *obtained by fraud, is a discharge in due course of law.*
Sim·ms v. *Slacum*, 300

INSURANCE.

1. If a policy upon a vessel has a clause "that if the vessel after a regular survey should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters.
Marine In. Co. v. *Wilson*, 187.
2. Quere, whether such report, even if it relate to the commencement of the voyage, would be conclusive evidence?
id. *ib.*
3. See *Non Intercourse*, 1.
4. If a vessel be insured *at* and from K. to A. and take a cargo for B. & A. and sail with intent to go first to B. and then to A. and is captured before she arrives at the dividing point between A. & B. this is a case of *intended deviation* only, and *not of non inception* of the voyage insured.
Marine In. Co. v. *Tucker*, 357
5. It depends upon the particular circumstances of the case, whether, if the vessel be captured and *recaptured*, the loss shall be deemed *total* or *partial*.
id. *ib.*
6. A promise by a factor that he would write to his principal to get insurance done, does not bind the principal to insure.
Randolph v. *Ware*, 503

JUDGMENT.

See *Collector*, 2. *Caveat*, 1.

JUDGE.

See *Court*, 2.

JURISDICTION.

1. The want of proper parties is not a good plea to a bill in chancery which suggests that such parties are out of the jurisdiction of the court.
Milligan v. *Milledge*, 220
2. If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States, in order to support the jurisdiction.
Strawbridge v. *Curtiss*, 267
3. This Court has not jurisdiction upon a writ of error to a *state* court, if the decision of the state court be in favour of the privilege claimed under an act of congress.
Gordon v. *Caldcleugh*, 268
4. All the rights to a testator's personal property are to be regulated by the laws of the country where he lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.
Dixon v. *Ramsay*, 319
5. If the court has not jurisdiction the officer executing its process is a trespasser.
Wise v. *Withers*, 331

JURY.
See *Damages*, 1.

JUSTICES OF PEACE.
1. Quere, whether the act of congress abolishing the fees of the justices of peace of the district of Columbia, can affect those justices who were in commission when the act was passed.
United States v. *More*, 159
2. A justice of peace of the district of Columbia, is an officer of the government of the United States, and exempt from militia duty.
Wise v. *Withers*, 331.
3. *See Habeas Corpus*, 1. *Warrant*, 1.

KENTUCKY.
See *Caveat*, 1.

LANDS.
1. Under the act of Pennsylvania of 3d April, 1792, for the sale of the vacant lands, &c. the grantee, by a warrant, of a tract of land lying north and west of the rivers Ohio and Alleghany, and Conewango creek, who by force of arms of the enemies of the United States, was prevented from settling and improving the said land for the space of two years from the date of his warrant, but during that time persisted in his endeavours to make such settlement and improvement, is excused from making such settlement as is described in the 9th section of the act, and the warrant vests in such grantee *a fee simple*.
Huidekoper v. *Douglass*, 1.
2. Quere, whether a British subject born in England in 1730, and who always resided there, could, in the year 1786, take and hold lands in Virginia by descent or devise?
Lambert v. *Paine*, 97.
3. See *Lien*, 1.

LEGACY.
If a testator declares that a certain legacy shall abate, if the personal and real estate of which he shall die seised and possessed, shall not be sufficient to pay all his debts and legacies, and if the estate be more than sufficient at the time of the testator's death, but afterwards become insufficient by means of the bankruptcy of the executor, such legacy shall abate for the benefit of the *other legacies*.
Silsby v. *Young*, 249.

LETTER OF CREDIT.
See *Assumpsit*, 2.

LETTERS TESTAMENTARY.
See *Executors*, 1 & 3.

LEX LOCI.
See *Jurisdiction*, 4.

LIEN.
The United States have no *lien* on the real estate of their debtor, until *suit brought*, or a *notorious insolvency*, or *bankruptcy*; *or* being unable to pay *all* his debts, he has made a *voluntary* assignment of *all* his property, *or* having absconded, &c. his property has been *attached* by process of law.
United States v. *Hooe*, 73

LIMITATIONS.
1. The act of limitations of Virginia begins to run against a creditor residing out of the state, if he comes into the state for temporary purposes, provided the *debtor* be in the state at that time.
Faw v. *Roberdeau*, 174
2. The treaty of peace prevents the operation of the act of limitations of Virginia upon British debts contracted before the treaty.
Hopkirk v. *Bell*, 454
3. An agent for collecting debts merely, is not a factor within the 13th section of the act of limitations of Virginia.
id. *ib.*

MILITIA.
See *Justices of Peace*, 2.
Court Martial, 1, 2.

MISTAKE.
1. He who sells property on a description given by himself, by mistake, is bound in equity to make good that description.
M'Ferran v. *Taylor*, 270
2. Quere, if the mistake be of a

matter deemed perfectly immaterial by both parties at the time of the contract, and which would not have varied the bargain if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?
M'Ferran v. *Taylor*, 270

MORTGAGE.

1. A mortgage of *part* of the property, of a *collector of the revenue* to his surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing *and future* indorsements for the mortgagor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts at the time the mortgage was given, and although the *mortgagee* knew, at the time of taking the mortgage, that the mortgagor was largely indebted to the United States.
United States v. *Hooe*, 73
2. A mortgage of *chattels*, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged, or proved, and recorded.
Hodgson v. *Butts*, 140
3. Quere, whether the mortgagee of a ship is entitled to the freight?
Hodgson v. *Butts*, 140
4. A decree for the sale of mortgaged property, on a bill to foreclose, is a *final* decree and may be appealed from.
Ray v. *Law*. 179

NAVY.

The commander of a United States ship of war, if he seizes a vessel on the high seas, *without probable cause*, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss.
Maley v. *Shattuck*, 458

NON-INTERCOURSE.

1. A vessel belonging to citizens of the United States in the year 1799, driven by distress into a French port and obliged to land her cargo in order to make repairs, and prevented by the officers of the French government from reloading her original cargo, and from taking away, in exchange, any thing but produce or bills, might lawfully purchase and take away such produce, and such voyage was not illegal, so as to avoid the insurance.
Hallet v. *Jenks*, 210
2. The act of June 13th, 1798, did not impose any disability upon *vessels* of the United States *bona fide* sold to foreigners residing out of the United States during the existence of that act.
Sands v. *Knox*, 499

NOTICE.

1. Notice of the time and place of taking a deposition, given to the *attorney at law*, is not sufficient under the law of Virginia.
Buddicum v. *Kirk*, 293
2. An attorney *at law* may agree to receive, or to waive notice, and shall not afterwards be permitted to allege want of it.
id. *ib.*
3. If notice be given that a deposition will be taken on a certain day, and if not finished on that day, that the commissioners will adjourn *from day to day* until it be finished, and the commissioners adjourn over several intermediate days, such deposition is not taken agreeably to notice.
id *ib.*

OFFICER.

See *Justice of Peace*, 2. *Navy*, 1. *Court Martial*. 2. *Trespass*, 1.

OPINION.

See *Court*, 2.

PAYMENT.

See *Evidence*, 8. *Action*, 1.

PENNSYLVANIA.

See *Lands*, 1.

PERSONAL GOODS.

All *rights* to the testator's *personal* property are to be regulated by the laws of the country where the testator lived; but *suits* for those rights must be governed by the laws of that country in which the tribunal is placed.
Dixon v. *Ramsay*, 319

PETERSBURGH.

By the act of congress of 10th of May, 1800, the collector of the district of *Petersburgh* was *not* restricted to a commission of 2 1-2 *per ct.* on the monies by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States.
United States v. *Heth*, 399

PLEADING.

1. See *Evidence*, 1.
2. In a declaration, the averment that the assignment of a promissory note was for *value received*, is an immaterial averment, and need not be proved.
Wilson v. *Codman*, 193
3. If the defendant plead the bankruptcy of the indorsor in bar, a replication stating that the note was given to the indorsor, *in trust for the plaintiff*, is not a departure from the declaration which avers the note to have been given for value received.
id. *ib.*
4. A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea.
Milligan v. *Milledge*, 220
5. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court.
id. *ib.*
6. A variance in date between the bond declared upon, and that produced on *oyer*, is matter of substance, and fatal upon the plaintiff's *special* demurrer to the defendant's bad rejoinder.
Cooke v. *Graham*, 229
7. A finding by a jury which contradicts a fact admitted by the pleadings, is to be disregarded.
M'Ferran v *Taylor*, 270
8. Upon the plea of payment to debt on bond, the defendant may give in evidence *wheat* delivered, on account of the bond, at a certain price; and also *an assignment* of debts to the plaintiff, part of which he collected, and part were lost by his negligence or indulgence.
Buddicum v. *Kirk*, 293
9. An assignment of debts cannot be pleaded as an *accord and satisfaction* to debt on bond.
id. *ib.*
10. Quere, whether a deputy marshal can plead in abatement that the *capias* was not served on him by a disinterested person?
Knox v. *Summers*, 496

PRACTICE.

1. See *Appeal*, 1, 2, 3. *Costs*, 1, 2, 3, 4, 5.
2. If statements of the case are not furnished according to the rule of the court on that subject, the cause will be dismissed or continued.
Peyton v. *Brooke*, 93
3. A certiorari will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record.
Field v. *Milton*, 514
4. If usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea.
Levy v. *Gadsby*, 180
5. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved.
Wilson v. *Codman*, 193
6. Upon the death of the plaintiff and appearance of his executor, the defendant is not entitled to a continuance; but he may insist on

the production of the letters testamentary, before the executor shall be permitted to prosecute.
id. *ib.*
7. See *Pleading*, 4, 5.
8. The want of proper parties is not a proper ground for dismissing the bill.
id. *ib.*
9. If the executor has no assets, you may proceed in equity against the devisees and legatees.
id. *ib.*
10. See *Pleading*, 6. *Variance*, 1.
11. See *General Rule.*
12. To support a judgment on a collector's bond at the return term, it must appear by the record, that the writ was executed 14 days before the return day.
Dobynes v. *United States*, 241
13. If the plaintiff in error does not appear, the defendant may either have the plaintiff called and dismiss the writ of error *with costs*, or he may open the record and go for an affirmance.
Montalet v. *Murray*, 249
14. See *Jurisdiction*, 2, 3.
15. A general *dismissal* of the plaintiff's *caveat*, in *Kentucky*, does not purport to be a judgment upon the merits.
Wilson v. *Speed*, 283
16. See *Notice*, 1, 2, 3.
17. The court, upon a trial by jury, is bound to give an opinion, if required, upon any point relevant to the issue.
Douglass v. *M'Allister*, 298
18. An appearance of the defendant, *by attorney*, cures all irregularity of process.
Knox v. *Summers*, 496

PROMISSORY NOTE.

1. An indorsor may avail himself of usury between the maker and the indorsee.
Levy v. *Gadsby*, 180
2. The averment that the assignment of a promissory note was for value received is immaterial, and need not be proved.
Wilson v. *Codman*, 193
3. If the defendant plead the bankruptcy of the indorsor in bar, a replication that the note was given to the indorsor, *in trust for the plaintiff*, is not a departure from the declaration which avers the note to have been given for value received.
Wilson v. *Codman*, 193
4. If a promissory note be received as conditional payment for goods sold and delivered, and be passed away, the vendor of the goods cannot maintain an action for the goods sold and delivered.
Harris v. *Johnson*, 311
5. An indorsee of a promissory note payable to order, cannot, in *Virginia*, maintain an action *at law*, against a remote indorsor; but he may *in equity*.
id. *ib.*

REGISTER.

See *Forfeiture*, 1.

REVENUE.

See *Lien*, 1. *Mortgage*, 1. *Non Intercourse*, 1, 2. *Collector*, 2. *Petersburgh*, 1. *Forfeiture*, 1.

RULE OF COURT.

See *General Rule*, 239

SEIZURE.

See *Forfeiture*, 1. *Navy*, 1.

SHIP.

See *Forfeiture*, 1. *Navy*, 1.

SLAVE.

If the owner of a slave, removing into *Virginia*, shall take the oath required by the act of assembly, within 60 days after the removal of the owner, it shall prevent the slave from gaining his freedom, although he was brought into *Virginia* by a person claiming and exercising the right of ownership over him, eleven months before the removal of the *true* owner; and although the person who brought him in never took the oath; and although the slave remained in *Virginia* more than one year; and although the true owner never brought him in.
Scott v. *Negro London*, 324

STATUTE.

The words of a statute, if dubious, ought to be taken most strongly against the law-makers.
United States v. *Heth*, 413

TRESPASS.

Trespass lies against the officer who executes the process of a court not having jurisdiction.
Wise v. *Withers*, 331

TRUST.

If the payee of a note hold it in trust, his bankruptcy will not take away his power to indorse it over to *cestui que trust*.
Wilson v. *Codman*, 193

USURY.

If A. lend money to B. who puts it out at usurious interest, and agrees to pay A. the same rate of interest which he is receiving upon A's money, this is usury between A. and B. and an indorsor of B's note to A. may avail himself of the plea of usury.
Levy v. *Gadsby*, 180

VARIANCE.

A variance between the date of the bond as stated in the declaration, and as it appears on *oyer*, is a matter of *substance*, and fatal on the plaintiff's special demurrer to the defendant's bad rejoinder.
Cooke v. *Graham*, 229

VERDICT.

A finding by the jury which contradicts a fact admitted by the pleadings, is to be disregarded.
M'Ferran v. *Taylor*, 270.

VIRGINIA.

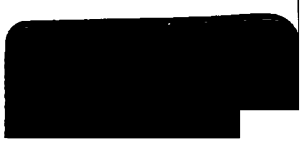
See *Costs*, 2. *British Subjects*, 1, 2. *Mortgage*, 2. *Limitations*, 1, 2, 3. *Bond*, 4. *Promissory Note*, 5. *Slaves*, 1. *Agent*, 3.

WARRANT.

A warrant of commitment by justices of the peace, must state *a good cause certain, supported by oath*.
Ex parte Burford, 448

WITNESS.

See *Evidence*, 5.

WRIT OF ERROR.

No appeal or writ of error lies in a criminal case, from a judgment of the circuit courts of the United States.
United States v. *More*, 159